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In The Supreme Court of the United States

UNITED STATES, ex rel., PAT COSTNER, SHARON GOLGAN, CAROLYN LANCE, DEBRA LITCHFIELD, BECKY SUMMERS, KENNY BROWN, EDWARD CAMPBELL, DON DANIEL, JEFFREY FOOT, DAVID HERMANSON, ARKANSAS PEACE CENTER, AND VIETNAM VETERANS OF AMERICA, ARKANSAS STATE COUNCIL, INC.,

Petitioners,

v.

URS CONSULTANTS, INC., MORRISON KNUDSEN CORPORATION, MRK INCINERATION, INC., AND VERTAC SITE CONTRACTORS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit Applied An Incorrect Legal Standard in Affirming the District Court's Dismissal of Most of Plaintiffs' *Qui Tam* Claims When It Decided that the Federal False Claims Act, Which Act Makes No Specific Reference to Materiality and Has No Common Law History of Such a Requirement, Implicitly Requires a Showing of Materiality In Order for the Government or a *Qui Tam* Plaintiff to Recover Funds for the Federal Treasury from a Government Contractor Who Has Received Millions of Dollars in Federal Funds Based on False Claims.

Whether the United States Court of Appeals for the Eighth Circuit Applied An Incorrect Legal Standard in Affirming the District Court's Dismissal of Most of Plaintiffs' *Qui Tam* Claims under the Federal False Claims Act, Which Act Was Amended in 1986 to Remove Government Knowledge as a Defense, When It Decided that Plaintiffs' Showing that a Government Contractor Had the Required Intent or Scienter (*i.e.*, Knowingly Submitting False Claims) Could Be Negated by the Defendant Showing that a Government Official Had Knowledge of the False Claims.

Whether the United States Court of Appeals for the Eighth Circuit Applied An Incorrect Legal Standard in Dismissing Plaintiffs' *Qui Tam* Action under the Federal False Claims Act When It Decided that Plaintiffs Had a Burden of Pleading "Fraud" with Particularity Under Fed. R. Civ. P. 9(b), and Decided that Although Plaintiffs Specifically Pled the Dates and Amounts of the False Claims Submitted by Defendants and Pled Substantial

QUESTIONS PRESENTED – Continued

Details of Why These Claims Were False (Including Who Was Involved in What Type of Dishonest Conduct), the Plaintiffs Must Also, in Order to Meet their Burden Under the Federal Rules, Know and Allege the Exact Dates and Times of Each Underlying Improper Act of Defendants (Such as the Dates Defendants Tampered with Monitoring Equipment on Their Hazardous Waste Incinerator) Even Where Defendants Chose Not to Record Those Dates To Avoid Incriminating Themselves.

Whether the United States Court of Appeals for the Eighth Circuit Applied An Incorrect Legal Standard In Affirming the District Court's Denial As Moot, Based on the District Court's Finding that Government Knowledge Negated Defendants' Intent and Demonstrated a Lack of Materiality, Plaintiffs' Motion For Partial Summary Judgment On Plaintiffs' Claims That Defendants Fraudulently Induced EPA And URS To Enter Into Contracts With The Defendants For Incineration Of Superfund Site Waste By Concealing and Failing to Disclose Material Facts Regarding Previous Malfunctions of the Defendants' Incineration Equipment and Resulting Releases of Highly Toxic Chemicals Into the Workplace and the Surrounding Community and Environment.

II. CORPORATE DISCLOSURE STATEMENT

The Appellants in this case who are non-governmental corporate entities are:

> (1) The Arkansas Peace Center, and (2) The Vietnam Veterans of America, Arkansas State Council, Inc. There are no parent corporation(s) of the Arkansas Peace Center. There is a national organization that is, in some sense, a parent corporation of the Vietnam Veterans of America, Arkansas State Council, Inc.: the Vietnam Veterans of America, Inc., whose main office is located in Silver Spring, Maryland. There are no publicly held companies that own 10% or more of either of these parties' stock. Both of these parties are not-for-profit corporations and neither party has issued stock.

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V. CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The primary decision by the United States Court of Appeals for the Eighth Circuit entered below is reported at *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003). App. 1-11. The Court of Appeals denied rehearing. App. 36. *United States ex rel. Costner v. United States*, No. 01-3764 (8th Cir. 04/09/2003), unofficially reported at 2003.C08.0000436 <http://www.versuslaw.com>.

VI. STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion affirming the District Court on January 28, 2003, and denied rehearing on April 9, 2003. The Petitioners filed this Petition within 90 days of the denial of rehearing.

28 U.S.C. § 1254 is the statutory provision which confers on this Court jurisdiction to review on a *Writ of Certiorari* the judgment and orders of the United States Court of Appeals for the Eighth Circuit in question in this case.

No special notifications pursuant to Rule 29.4(b) or (c) are required in this case.

VII. CITATIONS OF STATUTORY PROVISIONS

The provisions of the Federal False Claims Act involved in this case are 31 U.S.C. §§ 3729-3732. These provisions are lengthy and the text of same is set out in the appendix, at App. 37.

VIII. STATEMENT OF THE CASE

This is a *qui tam* action brought on behalf of the United States by the Plaintiffs as relators pursuant to the False Claims Act (FCA), 31 U.S.C. §§ 3729-3732. The complaint alleges that URS Consultants, Inc. (URS), Morrison Knudsen Corporation (MK), MRK Incineration, Inc. (MRK), and Vertac Site Contractors (VSC) submitted false claims for payment under a federal government contract for the treatment and disposal of hazardous waste at the Vertac Chemical Plant site in Jacksonville, Arkansas. The District Court had subject matter jurisdiction over this action pursuant to the False Claims Act, 31 U.S.C. § 3732(a) and *via* 28 U.S.C. § 1331.

The plaintiffs filed this False Claims Act suit in 1995. The suit arises out of the Defendants' contract with the Environmental Protection Agency (EPA) to clean up a contaminated industrial site known as the Vertac site. From 1948 to 1987, the Vertac site was home to chemical, herbicide, and pesticide production facilities. The site became extremely contaminated with dioxin and other highly toxic chemicals as a result of years of improper hazardous waste disposal. The United States EPA placed the site on the Superfund National Priorities List. Vertac Chemical Company abandoned the site. The EPA initiated an emergency removal action. The State negotiated a contract for on-site incineration of the waste with MRK Incineration, Inc., which subsequently assigned the contract to Vertac Site Contractors (VSC), a joint venture composed of MRK and MK Environmental Services, a division of Morrison Knudsen Corp.

The State contract provided for incineration of the drummed hazardous waste. The incineration project was

funded by a settlement of the EPA and State litigation against the polluter. The EPA remained involved in the incineration project by monitoring air quality, handling and transporting the drums of waste to be incinerated by the contractors, and disposing of incinerator ash. In 1992, when the settlement trust fund was soon to be exhausted, the EPA assumed primary responsibility for the site and approved a federal removal action using federal funds. When the State administered trust fund was depleted, the State terminated its contract with VSC. EPA then issued a contract to URS Consultants, Inc. (URS) for continued incineration and URS then entered into a contract with VSC to conduct the remaining incineration activities. The EPA assumed responsibility for the project on June 8, 1993. In 1995, after allegations of wrongdoing by the contractors were brought forward by the Plaintiffs, the EPA transported the remaining containers of the most toxic waste (the 2,4,5-T dioxin contaminated waste drums) to a site in Kansas for incineration.

The Plaintiffs allege that before and during the course of the contract the Defendants actively concealed serious operational problems and numerous regulatory violations from the EPA, including threats to public health, worker safety and the environment; committed fraud in the inducement of EPA to enter the contract; and subsequently submitted false claims for payment of millions of dollars for work certified as if it were in compliance with the contract when, in fact, the work was actually in violation of contract provisions intended to protect worker safety, public health and the environment.

Defendants filed a first round of motions to dismiss which were denied by the District Court leading to a prior appeal decided by an Eighth Circuit panel. *See, Costner v.*

URS Consultants, 153 F.3d 667 (8th Cir. 1998). After remand, Defendants filed another round of motions to dismiss and for summary judgment interspersed during active discovery depositions and document exchange and prior to the motions deadline. The District Court set deadlines of December 18, 2000 for motions, January 8, 2001 for responses, and January 15, 2001 for replies. On December 15, 2000, the District Court heard argument on Defendants' early motions. On December 18, 2001, Plaintiffs filed their Motion for Partial Summary Judgment. On December 21, 2000, the District Court sent a letter to Counsel for all parties indicating that the District Court intended to issue an Order granting in large part Defendants' early filed Motion to Dismiss or For Summary Judgment. Court of Appeals Appendix (CA App.) at 1215. Docket, CA App. 1-20. Plaintiffs filed their Rule 56(f) Motion to hold the decision on Defendants' motions in abeyance pending completion and evaluation of discovery on January 8, 2001. CA App. 1217. On January 18, 2001 the District Court issued its Order denying Plaintiffs' Motion for Relief under Rule 56(f), Fed. R. Civ. P. CA App. at 1344.

On January 31, 2001 the District Court granted in large part Defendants' Motion to Dismiss or for Summary Judgment, CA App. at 1347, declaring Plaintiffs' Motion for Partial Summary Judgment moot. In this decision the District Court dismissed all of Plaintiffs' claims, except the claims regarding intentional tampering with the incineration monitoring instruments, on the basis that some government officials knew of those non-tampering false claims and consequently, in the District Court's view, those false claims would not have been "material." The District Court also ruled that consequent to the government's knowledge, the Defendants would not have had the requisite intent or knowing state of mind regarding the

submission of false claims. The District Court in this same decision also dismissed all the tampering related claims, except for two dates (which Plaintiffs identified specifically as dates on which tampering occurred) on the basis of a failure to plead with sufficient particularity under Fed. R. Civ. P., Rule 9(b).

On March 6, 2001, the District Court denied Plaintiffs' Motion for Reconsideration. CA App. at 1943. In April, 2001, a two week trial was conducted on the remaining tampering claims. On October 22, 2001, the Judgment and Order of the District Court was issued, holding for Defendants and dismissing Plaintiffs' Complaint. App. 12, 35. CA App. at 1922-42 and 1921. Plaintiffs appealed, and the Eighth Circuit affirmed the District Court decision. App. 1.

Defendants operated a hazardous waste incinerator for the Vertac Superfund site waste under EPA contract which required, *inter alia*, compliance with environmental and worker safety laws. Plaintiffs' Motion for Partial Summary Judgment (P.S.J.), Docket 220, Exhibit 1, CA App. 892; Plaintiffs' Trial Exhibits 174, CA App. 1967; P. Tr. Ex. 186, CA App. 1980. EPA would not have approved continued payments under a contract with Defendants or entered into a contract with the Defendants had it known the Defendants had knowingly concealed material information from EPA, knowingly violated the contract or knowingly allowed a danger to the public or workers. EPA's Caban's Deposition, CA App. 1272, 1286; EPA's Ehrhart's Deposition, P.S.J. Exhibit 29, CA App. 1003; P.S.J. Ex. 40, CA App. 1099; EPA's Luthans' Deposition P.S.J. 39, CA App. 1091; EPA's Luthans' Letter to Adair P.S.J. Exhibit 20, CA App. 966.

The undisputed material facts which are referenced to a "P.S.J." Exhibit were presented to the District Court in support of Plaintiffs' Motion for Partial Summary Judgment (P.S.J.), which the District Court denied as moot (although timely filed within the motions deadline). Defendants VSC, MRK and MK failed to disclose material information to U.S. EPA during negotiations regarding the June, 1993 and subsequent contracts and work assignments, and during negotiations of subcontracts between URS and VSC, MK and MRK, *see*, Transcript, April 23, 2001, Fowler at 1231; April 20, 2001, Apa at 1014-1016, but attempted to mislead the District Court into believing otherwise. Transcript April 20, 2001, Apa at 991-993 compared to *Id.* at 1014-1016 and Transcript April 23, 2001, Fowler at 1231. The material information concealed dealt with the Defendant's measurement of high levels of dioxin, a very toxic chemical that was the focus of the Vertac Superfund site cleanup, in the on-site air to which workers were exposed without respiratory protection. *Id.* These high levels of dioxin in the air were detected by VSC on-site air monitors repeatedly in 1992 and early 1993 during the contract negotiations. *See*, P.S.J. Exhibit 7, CA App. 915.

These high dioxin levels detected in VSC air monitors exceeded the VSC safety plan standard for worker respiratory protection many times over. *See*, 5.5 pg/m3 standard in the VSC Safety Plan, P.S.J. Exhibit 3, CA App. 904, and Ex. 6, 913, compared to the numerous levels reported in P.S.J. Exhibit 7, CA App. 915, above that standard (*see, e.g.*, 18 pg/m3 and 194 pg/m3). These levels of dioxin are also considered dangerous based on the scientific literature. P.S.J. Exhibit 36, CA App. 1028.

The URS Contract, and the VSC Subcontract under Attachment B, Minimum Design Requirements at 2.3, p.

C-B2, require Defendants to develop a Health and Safety Plan to be approved by EPA prior to the initiation of work at the site, which plan had to include a respiratory protection program. P.S.J. Exhibit 1, CA App. 892 (EPA Inspector General's review of Contract); Plaintiffs' Trial Exhibits 174, CA App. 1967; P.Tr. Ex. 186, CA App. 1980. The URS Contract, and the VSC Subcontract under Attachment B, "Minimum Design Requirements" at 2.3, p. C-B2, require Defendants to develop a Health and Safety Plan to be approved by EPA prior to the initiation of work at the site, which plan was required to include hazards analysis and designation of action levels. *Id.*

The VSC safety plan was mandatory under the federal contracts, and the standard of 5.5 pg/m3 was not only the standard adopted by VSC for protection of workers but is also the identical standard recommended by federal agencies and adopted by EPA itself for its own perimeter air monitors operated by URS for protection of public health. *See*, P.S.J. Exhibits 2, CA App. 902 (contract required safety plan); P.S.J. Exhibit 3, CA App. 903, 904-05; P.S.J. Exhibit 4, 907, 908 (URS safety plan required respiratory protection); P.S.J. Exhibit 5, 909 (U.S. Health and Human Services Department, Agency for Toxic Substances and Disease Registry (ATSDR) recommended the 3.0 pg/m3 level for respiratory protection of humans not provided respiratory protection for short term exposures and the 5.5 pg/m3 was considered an exposure level equivalent to the tolerable daily dose set by ATSDR for humans based on animal studies for non-cancer effects for short term exposures).

Defendant VSC determined through analysis of company operational records that the dangerously high dioxin air level exceedances were due to operational

problems with the Vertac incinerator, specifically including kiln puffs and kiln seal leaks of partially burned agent orange waste. *See*, P.S.J. Exhibit 7, CA App. 915, 920, 922. Defendant VSC failed to disclose this material information to EPA, both the high dioxin levels that exceeded worker safety standards, and the cause of the high dioxin levels (kiln puffs and kiln leaks) during the 1992 and early 1993 time period which coincided with EPA contract negotiations. EPA entered into the contracts with URS and approved the subcontracts between URS and VSC on the false impression that dangerous dioxin air level exceedances of worker safety standards had not occurred and in ignorance that the cause of such violations had been determined to be kiln puffs and kiln seal leaks of agent orange waste. *See*, P.S.J. Exhibit 26, CA App. 983 (EPA FOIA response indicating that EPA as of June, 1994 did not possess any VSC on-site air monitoring data for periods prior to June of 1993); P.S.J. Exhibit 9, CA App. 927 Deposition of Defendants' Industrial Hygienist Fred Fowler (high levels of dioxin measured in air in kiln puff by Defendant VSC not reported to EPA during February 1992 meeting at EPA offices).

EPA was committed to protecting worker safety during the Vertac incineration project and would have shut down the incinerator and stopped payments to Defendants had it known that the kiln puffs and kiln seal leaks that continued to occur throughout the EPA contract were endangering worker safety and health. *See*, EPA's Ehrhart's Deposition P.S.J. Exhibits 29, CA App. 1003, Ex. 40, CA App. 1099; EPA's Luthans' Deposition P.S.J. Exhibit 39, CA App. 1091; EPA's Luthans' Letter to Adair, 3rd page P.S.J. Exhibit 20, CA App. 966 (EPA would have suspended operations if it had reason to believe that operations were causing an unreasonable risk, URS' air monitors were not located to protect workers and EPA's

Luthans believed [erroneously] that VSC workers were wearing respirators on their face on the job). P.S.J. Exhibits 39, CA App. 1091; Ex. 20, CA App. 966; Def. Trial Exhibit 147; Transcript, April 20, 2001, Apa at 995-97.

EPA's Contract with URS required compliance with OSHA and protection of workers generally and URS' subcontract with VSC required the same. *See, e.g.*, P.S.J. Exhibit 1, CA App. 892, 897-8; Plaintiffs' Trial Exhibits 174, CA App. 1967; P.Tr. Ex. 186, CA App. 1980; EPA's Caban's Deposition, CA App. 1272, 1287-88, 1292-94. OSHA requires a safe workplace to be maintained by the employer free from recognized hazards under the general duty clause. OSHA regulations at 29 CFR § 1910.120 require employers to provide workers adequate respiratory protection.

VSC's Health and Safety Plan required VSC to maintain worker respiratory exposures to dioxin below 5.5 picograms/meter cubed on an 8 hour average for either 2,3,7,8-TCDD or dioxin toxic equivalents. P.S.J. Exhibits 3, CA App. 903 and Ex. 6, CA App. 913. VSC's industrial hygienist, Dr. Charles "Fred" Fowler, recognized that federal agencies recommended respiratory exposure to dioxin was a "not to exceed" level of 5.5 picograms/meter cubed. Fowler Deposition, P.S.J. Exhibit 9, CA App. 927, 931. EPA personnel in control of the Vertac project acknowledged their contract with URS required protection of workers' health and safety as well as of public health and the environment. EPA's Caban's Deposition, CA App. 1272, 1287-89, 1292-94; EPA's Ehrhart's deposition, P.S.J. Exhibits 29, CA App. 1003; Ex. 40, CA App. 1099. EPA set an action level for dioxin in the air at the URS operated perimeter monitors of 5.5 picograms/meter cubed for any

three day sample and 3.0 picograms/meter cubed for a twenty-one day average. P.S.J. Exhibit 2, CA App. 902.

During the several month period of EPA negotiation with URS and VSC regarding the contemplated future incineration of agent orange waste at the Vertac site by VSC and URS under an EPA contract (which had been proceeding under a State contract), VSC additionally failed to disclose their correlation and analysis of data indicating the cause of the high dioxin levels in the air was due to incinerator kiln seal leaks and kiln puffs. The VSC and URS continued to conceal this critical information even when EPA attempted later, after the EPA/URS and URS/VSC contracts began in June, 1993 (*see*, P.S.J. Exhibit 28, CA App. 998, letter contract), to determine the cause of an elevated dioxin reading on one of the URS perimeter monitors, and URS determined that the reading might have been caused by one specific kiln puff. P.S.J. Exhibit 22, CA App. 971.

During the month of February, 1992, Dr. Charles "Fred" Fowler attended a meeting with EPA representatives to discuss a recent inspection and evaluation of the Vertac incinerator by EPA consultants. P.S.J. Exhibit 9, CA App. 927. VSC had in their possession at that time data showing measured high levels of dioxin in the air onsite during a kiln puff. *Id.* This data showed more than 30 picograms/meter cubed of dioxin was present in the air onsite because of the kiln puff, which level was more than five times higher than EPA's action level and VSC's own worker safety standard. *Id.* This information was not disclosed to either EPA or the incineration inspectors at the meeting, P.S.J. Exhibit 9, CA App. 927, nor was it revealed to the EPA at any time prior to the initiation of the EPA contract with URS in June, 1993. P.S.J. Exhibit

26, CA App. 983 (EPA Freedom of Information Act Response); Transcript, April 20, 2001 Apa at 1014-1016.

IX. ARGUMENT ON REASONS FOR ALLOWANCE OF THE WRIT

A. A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The False Claims Act provides for the government or a private plaintiff to bring suit to recover funds for the federal treasury which were improperly taken by a government contractor via submission of false claims for payment. 31 U.S.C. §§ 3729-3732. Three elements are explicitly required to be shown for a plaintiff to recover under the Act:

> (1) the Defendants made a claim against HUD; (2) the claim was false or fraudulent; and (3) the Defendants knew the claim was false or fraudulent. *See, e.g., United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 803 (8th Cir. 2001); *United States ex rel. Oliver v. The Parsons Co.*, 195 F.3d 457, 461 (9th Cir. 1999); *United States v. Burns*, 162 F.3d 840, 850 (5th Cir. 1998).

United States of America v. Southland Management Corporation, 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds*, 326 F.3d 669 (5th Cir. 2003) (*en banc*). A number of the courts of appeals, including the Eighth Circuit in the instant case, have held that in order for the government or a *qui tam* plaintiff-relator to recover under the Act there must be, in addition to a showing that the three explicit statutorily defined elements have been

met, also a showing of materiality, *i.e.*, that the false claims were material to the government's decisions. The Act does not reference the term "materiality" explicitly nor does the Act explicitly reference the concept of materiality as a requirement. As explained in section IX.C. *infra*, the courts of appeals who have imposed a materiality requirement are split on what exactly the legal standard is for showing materiality, *e.g.*, whether an actual impact on the agency's contract or payment decisions must be shown or whether mere relevance of the false claim to such agency decisions must be established. However, within the last six years the Supreme Court twice has issued opinions in closely related statutory fraud cases which make clear that there is no implied materiality requirement for claims brought under a federal statute that sanctions *false* statements as distinguished from *fraudulent* statements.

> The Government argues that because Congress has provided express materiality requirements in other statutes prohibiting fraudulent conduct, the absence of such an express reference in the fraud statutes at issue "'speaks volumes.'" Brief for United States 35 (citing 21 U.S.C. § 843(a)(4)(A)) (prohibiting the furnishing of "false or fraudulent material information" in documents required under federal drug laws); 26 U.S.C. § 6700(a)(2)(A) (criminalizing the making of a statement regarding investment tax benefits that an individual "knows or has reason to kno[w] is false or fraudulent as to any material matter"). These later enacted statutes, however, differ from the fraud statutes here in that they prohibit both "false" and "fraudulent" statements or information. **Because the term "false statement" does not imply a materiality requirement, *United States v. Wells*, 519 U.S.**

> **482, 491, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997)**, the word "material" limits the statutes' scope to material falsehoods. Moreover, these statutes cannot rebut the presumption that Congress intended to incorporate the common-law meaning of the term "fraud" in the mail fraud, wire fraud, and bank fraud statutes. That rebuttal can only come from the text or structure of the fraud statutes themselves. *See Nationwide Mut. Ins.*, 503 U.S., at 322, 112 S.Ct. 1344.

Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S.Ct. 1827, 1840 note 7 (1999) (emphasis added).

> We accordingly consider whether materiality of falsehood is an element under § 1014, understanding the term in question to mean "ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decision-making body to which it was addressed," *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 1546, 99 L.Ed.2d 839 (1988) (internal quotation marks *490 omitted); *see also, United States v. Gaudin*, 515 U.S., at 509, 115 S.Ct., at 2313. [FN7] We begin with the text. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166, 2172, 104 L.Ed.2d 811 (1989). Section 1014 criminalizes "knowingly mak[ing] any false statement or report . . . for the purpose of influencing in any way the action" of a Federal Deposit Insurance Corporation (**927 FDIC) insured bank "upon any application, advance, . . . commitment, or loan." 18 U.S.C. § 1014. Nowhere does it further say that a material fact must be the subject of the false statement or so much as mention materiality. [footnote omitted] To the contrary, its terms cover "any" false statement that meets the other

requirements in the statute, and the term "false statement" carries no general suggestion of influential significance, see *Kungys v. United States*, *supra*, at 781, 108 S.Ct., at 1552; *cf. Kay v. United States*, 303 U.S. 1, 5-6, 58 S.Ct. 468, 471, 82 L.Ed. 607 (1938). Thus, under the first criterion in the interpretive hierarchy, a natural reading of the full text, see *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-543, 60 S.Ct. 1059, 1063-1064, 84 L.Ed. 1345 (1940), materiality would not be an element of § 1014. . . . Nor have respondents come close to showing that at common law the term "false statement" acquired any implication of materiality that came with it into § 1014. . . . 458 U.S. 279, 288, 102 S.Ct. 3088, 3093-3094, 73 L.Ed.2d 767 (1982). The most likely inference in these circumstances is that Congress deliberately dropped the term "materiality" without intending materiality to be an element of § 1014. . . . Although some courts have read *Kay* as holding only that there is no need for the Government to prove that false statements actually influenced the decision-maker, see, e.g., *United States v. Goberman*, 458 F.2d 226, 229 (C.A.3 1972), the opinion speaks of the importance of the statements as well as their efficacy, and no one reading *Kay* could reasonably have assumed that criminal falsity presupposed materiality. Since we presume that Congress expects its statutes to be read in conformity with this Court's precedents, see, e.g., *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 115 S.Ct. 1927, 1930, 132 L.Ed.2d 27 (1995), and since the relevant language of the statute in *Kay* was substantially like that in § 1014, *Kay* stands in the way of any

> assumption that Congress might have understood an express materiality provision to be redundant.

United States v. Wells, 519 U.S. 482, 117 S.Ct. 921, 137 L. Ed. 2d 107 (1997).

At least two Circuits have recently recognized that the Supreme Court decisions in *Neder* and *Wells* establish a rule that likely precludes any further imposition by the courts of appeals of an implied materiality requirement in cases under the False Claims Act although the facts of those cases were such that those courts of appeals were not yet forced to squarely decide the issue. *United States of America v. Southland Management Corporation*, 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds*, 326 F.3d 669 (5th Cir. 2003) (*en banc*) (*citing Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1840 note 7 (1999)); *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3d Cir. 1999).

> Although the statute contains no express reference to materiality, many courts, including this court, have found that there is a fourth, "materiality" element required to maintain a cause of action under the Act. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) ("The FCA 'interdicts material misrepresentations made to qualify for government privileges or services.'") (quoting *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977)); *see also, Luckey v. Baxter Health Care Corp.*, 183 F.3d 730, 732 (7th Cir. 1999); *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1459 (4th Cir. 1997); *United States v. Intervest Corp.*, 67 F. Supp. 2d 637, 646 (S.D.

Miss. 1999). *But see United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415 (3d Cir. 1999) (noting in *dicta* that "perhaps" there is no materiality requirement under the FCA); *United States ex rel. Roby v. The Boeing Co.*, 184 F.R.D. 107, 112 (S.D. Ohio 1998) (finding that materiality is not a required element of proof in actions under the FCA). . . .

On appeal, the Government contends that the civil False Claims Act does not contain the type of "outcome materiality" element espoused by the District Court, requiring a plaintiff to demonstrate that the misstatement influenced the government's (i.e., HUD's) ultimate decision whether to remit funds to a defendant. The Government argues that the Supreme Court's recent decisions in *Wells* and *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), counsel against the existence of such a materiality requirement. n15. Instead, the Government maintains that proving a "false claim" under the Act requires the Government to demonstrate only that the alleged falsehood was relevant to the Defendants' claim of right or entitlement. [footnote omitted]

n15 While we do not reach this issue today, we note that if a future panel of this court is faced squarely with the question whether materiality is an element of the civil FCA, this court will need to assess whether and to what extent *Wells* and *Neder* might undermine our precedents interpreting the civil FCA to contain an implicit materiality requirement.

United States of America v. Southland Management Corporation, 288 F.3d 665 (5th Cir. 2002), *vacated and*

decided on other grounds, 326 F.3d 669 (5th Cir. 2003) (*en banc*). The Third Circuit in *dicta* likewise noted that the Supreme Court decision in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 1840 note 7 (1999) stands for the proposition that there is no materiality requirement in a false claims case. *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3d Cir. 1999).

> Thus, *Hopper* does not stand for the proposition that before a court allows a suit to proceed under the False Claims Act, it must weigh how serious it thinks a particular knowing falsehood was in a claim submitted to the government. Although we reject the District Court's reading of *Hopper*, the Court's remark about "technical violations" suggests two slightly different objections: Bluestone's omissions were not material, and even if they were, they did not cause any damages to the government. We will consider first the materiality objection. Courts have held that claims under the False Claims Act are subject to a judicially imposed materiality requirement. *See, e.g.*, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). And the Supreme Court recently held in *Neder v. United States*, ___ U.S. ___, 119 S.Ct. 1827 (1999) that there is a materiality requirement under the federal mail-fraud, wire-fraud, and bank-fraud statutes. In a footnote, the Supreme Court indicated, however, that the term "false statement," unlike "fraudulent statement," does not imply a materiality requirement. *Neder*, 119 S.Ct. at 1840 n.7. Given that the False Claims Act prohibits merely making a knowingly false claim and does not require a specific intent to defraud, perhaps *Neder* argues against a materiality requirement.

Id. The Plaintiffs-Petitioners brought these Supreme Court and courts of appeals' decisions to the attention of the Eighth Circuit panel during briefing and oral argument. The Eighth Circuit panel in its decision in the instant case cited to the two recent decisions on the issue from the other courts of appeals but failed to address or reference the Supreme Court decisions in *Neder* and *Wells* or the Court of Appeals' obligation to comply with the rule established in those Supreme Court decisions.

> In addition, several courts have required that the falsehood in the claim must be material to the payment decision. The District Court dismissed all but two of the Plaintiffs' claims for failure to present affirmative evidence raising a genuine issue of material fact regarding the materiality of the Defendants' alleged misstatements and omissions. The existence of and appropriate standard for a materiality element is a matter of some disagreement in the courts. *See, e.g., United States, ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415-16 (3d Cir. 1999) (declining to decide whether such an element exists because the claims at issue would easily qualify); *United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 674-78 (5th Cir.) (questioning existence of materiality element, but finding that false certification of compliance with condition required for payment satisfied even strict outcome materiality standard), reh'g en banc granted, 307 F.3d 352 (5th Cir. 2002); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (applying materiality requirement that depends on "whether the false statement has a natural tendency to influence agency action").

United States ex rel. Costner v. United States, 317 F.3d 883 (8th Cir. 2003). The decision of the Eighth Circuit in the instant case and the other circuits who have held in prior cases that there is a materiality element implied in the False Claims Act are in direct conflict with the rule of law established in the decisions of this Court in *Neder* and *Wells*, notwithstanding that the *Neder* and *Wells* decisions did not involve False Claims Act cases *per se*. For this reason, and given the importance of consistent law in false claims litigation which involves recovery of literally billions of dollars for the federal treasury and likely prevents even greater losses to the federal treasury *via* deterrent effects, it would be appropriate and in the public interest for this Court to grant the instant Petition for a *Writ of Certiorari*.

B. A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

It is not clear why the Eighth Circuit Panel in this case felt free to ignore this Court's decisions in *United States v. Wells*, 519 U.S. 482, 491 (1997) and *Neder v. United States*, 527 U.S. 1 note 7 (1999). Both decisions were very clear in their analysis and holdings to the effect that federal statutes that impose liability for making false statements, as distinguished from making fraudulent statements or engaging in fraudulent conduct, do not contain by implication any materiality requirement. For such a materiality requirement to be imposed regarding false statements there would have to be explicit statutory language mandating a materiality requirement. The federal False Claims Act on its face states no such explicit

materiality requirement, while clearly imposing liability for submitting claims and making statements in support of claims that are merely false, not necessarily fraudulent. Many of the courts of appeals will continue to wrongly apply a materiality requirement in false claims cases until this Court states clearly in the context of an actual False Claims Act case that the *Neder* and *Wells* rule applies in False Claims Act cases, as the Third Circuit in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3d Cir. 1999) and the Fifth Circuit in *United States of America v. Southland Management Corporation*, 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds*, 326 F.3d 669 (5th Cir. 2003) (*en banc*) have suggested it likely does.

Whether or not the False Claims Act imposes a materiality requirement is an important question of federal law on which the circuits are conflicted that should be settled by this Court. The ultimate answer to this question will make the difference in many cases whether the government or *qui tam* plaintiff recovers money for the federal treasury that was paid out on a false claim. This will be particularly true in cases where: 1) a government official who has worked closely with a contractor or may be a co-conspirator attempts to cover for the defendant who has submitted the false claims by asserting that the underlying misconduct and contract non-compliance was of no concern to the agency contracting for the work, and 2) where time has passed and records or memories lost or witnesses have died or become unavailable.

> If such a "but for" causation requirement existed in [the "procured by" language] it is most unlikely that a materiality requirement would have been added as well – requiring, in addition

> to distortion of a decision, a natural tendency to distort the decision. Moreover, the difficulty of establishing "but for" causality . . . many years after the fact, is so great that we cannot conceive that Congress intended such a burden to be met before a material misrepresentation could be sanctioned.
>
> 485 U.S. at 776-77 (opinion of Scalia, J., joined by Rehnquist, C.J., and Brennan, J.). This analysis suggests that "materiality" and "but-for causation" are distinct (and, indeed, inconsistent) requirements.
>
> Finally, as the above passage indicates, where are problems of proof that arise when the government is required to demonstrate that a claimant's misrepresentation actually motivated its decision to approve a claim. Imposing such an evidentiary burden risks excessively constraining the government's ability to sanction claimants who make false representations to the government. As we share Justice Scalia's concerns in this regard, we reject the dissent's suggestion that "but-for causation" is the appropriate test of materiality in the instant case.

United States of America v. Southland Management Corporation, 288 F.3d 665, *vacated and decided on other grounds*, 326 F.3d 669 (5th Cir. 2003) (*en banc*).

The same is true on the issue of the nature of the pleading with particularity requirements imposed on false claims plaintiffs, government or private, pursuant to Fed. R. Civ. P., Rule 9(b). This is likewise an important question of federal law that should be settled by this Court. The Eighth Circuit panel here adopted the District Court's erroneous interpretation of the particularity requirement,

App. 1-11 (Eighth Circuit decision), App. 12-34 (District Court decision), requiring Plaintiffs to specify not just the false claims in detail, which Plaintiffs did, but also to specify the Defendants' underlying misconduct by date, time and precision when such evidence remained in the control of the Defendants. Plaintiffs pled with particularity the Defendants' numerous false claims for payments submitted to the government complete with dates, invoice numbers, amounts requested and the Defendants' certifications that work was in compliance with, *inter alia*, applicable state and federal environmental and OSHA laws and regulations.

The Court of Appeals erred in not distinguishing between the false claims for payment, which were indisputably pleaded with particularity, and the underlying misconduct. Even the underlying misconduct here was pled with what most other courts would find sufficient particularity. The extent to which the government or a *qui tam* plaintiff will need to allege details of a defendant's misconduct that are exclusively under the control of the wrongdoer defendant (such as in the instant case in regard to dates of illegal tampering of instruments on a hazardous waste facility) will continue to be interpreted differently by different courts of appeals until the issue is settled by this Court.

Many courts will apply the long standing rule that a defendant should not be allowed to benefit from his own misconduct. Wrongdoers who break the law for profit seldom take pains to create an incriminating record of the dates, times and particulars of their fraudulent acts, false claims, and crimes. They also seldom volunteer the incriminating evidence to the government or private plaintiff. Requiring the government or *qui tam* plaintiff to

produce and plead details of the underlying wrongful acts which are exclusively in the control of the wrongdoer defendant is an unreasonable burden. It would be in the public interest for this Court to settle this point of law now, before this erroneous requirement is allowed to siphon off future funds which rightfully should be returned to the federal treasury.

A third important question of federal law raised by the instant case that should be settled by this Court is the extent to which and under what circumstances a government official having knowledge of a defendant's false claims can serve as a defense, either by negating a showing of the required intent and knowing state of mind or by indicating that the false claims were not "material." Here, the Eighth Circuit Court of Appeals affirmed the District Court's holding that EPA was aware of certain allegations regarding Defendants' misconduct and continued to pay Defendants under the contract, for at least a time, indicated that the required intent was absent (*i.e.*, that Defendants did not "knowingly" submit false claims) and that the false claims were not "material" to EPA's contract and payment decisions, thereby precluding recovery under the Act. App. 1-11. As noted, *infra*, the courts of appeals are split on the relevance of government knowledge as a defense, particularly in light of the 1986 amendments to the Act which explicitly removed the government knowledge defense. The public interest would be well served by resolving this issue for the courts nationwide as soon as possible.

C. A UNITED STATES COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME IMPORTANT MATTER

Granting the instant Petition would resolve splits in the courts of appeals on at least three major legal issues regarding the federal False Claims Act. First, the courts of appeals are split on whether and under what circumstance government knowledge can be a defense in a false claims case following the 1986 amendment to the Act which explicitly removed government knowledge as a defense. In *United States v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), the Ninth Circuit addressed the issue of government knowledge as a defense and made clear that, absent special circumstances where the defendants could be shown to have done nothing more than what the government instructed them to do, the fact that the government knew a claim was false does not remove the defendants' liability if the defendants also knew the claim was false and submitted it anyway.

> What is crucial – and what must be proven at trial – is that the Water Agency knew that the information was false. The statute emphasizes that the act, for which the civil claim may be filed is to "knowingly" present or cause to be presented a false or fraudulent claim, 31 U.S.C. sec. 3729(a)(1). . . . The emphasis on "knowing" and "knowingly" is reinforced by their statutory definitions. *Id.* (b).
>
> That a defendant has disclosed all the underlying facts to the government may, the United States in its brief concedes, show that the defendant

> had no intent to deceive. But what constitutes the offense is not intent to deceive but knowing presentation of a claim that is either fraudulent or simply false. 31 U.S.C. sec. 3729(a)(1) and (2). The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense. *United States v. Ehrlich*, 643 F.2d 634, 638-639 (9th Cir. 1981).

Id. This standard, which itself may be inconsistent with the False Claims Act as amended in 1986, is more restrictive on use of the government knowledge defense than the standard used by the Eighth Circuit and the District Court below in the instant case.

The Tenth Circuit has also been more reluctant than the Eighth Circuit to embrace government official knowledge as a defense.

> Assuming some level of government knowledge would negate the intent requirement under the FCA as a matter of law, the level of government knowledge in the present case does not do so. It was the plaintiff, Shaw, and not the individual defendants or other AAA employees, who told the government about the failure to practice silver recovery. Additionally, AAA was not forthcoming about silver recovery and repeatedly evaded government employees' questions on the subject. . . . The government's alleged knowledge of Defendants' actions therefore does not, as a matter of law, negate the evidence of Defendants' intent to submit a false record in support of a claim. *See* 31 U.S.C. § 3729(a)(2).

Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 519 (10th Cir. 2000).

The courts of appeals are likewise split regarding the level of detail required to satisfy Rule 9(b) pleading with particularity requirements in a false claims case. "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial and (2) that plaintiff has substantial prediscovery evidence of those facts." *Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776, 784 (4th Cir. 1999). The Eighth Circuit panel in the instant case imposed a more demanding standard than the Fourth Circuit for pleading with particularity. Other Circuits have also been less demanding than the Eighth Circuit. *See, e.g., Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1998). Rule 9(b) does not apply to every single allegation in a fraud complaint. As stated in *United States ex rel. Schwartz v. Coastal Healthcare Group, Inc.*, 232 F.3d 902 (10th Cir. 2000) the particularity requirements apply only to the false statements themselves, not to every action taken by the defendant.

The allegations of tampering in the instant case are not about fraud. They involve other kinds of wrongs. Tampering with the PT-125 instrument on the Vertac incinerator violated governmental health and safety regulations, and unquestionably breached the contract between the parties but it was not, in itself, fraud. The fraud did not occur until defendants covered up their wrongdoing and submitted claims for payment without disclosing the material facts including the tampering. Plaintiffs' complaint describes this cover-up in great detail. It sets forth the time, place and contents of the

alleged false representations (*i.e.*, the false claims for payment and reports in support thereof) – the who, what, where, when and how, not to mention the why. The Eighth Circuit has applied a more demanding pleading requirement than Rule 9(b) intended and than other Circuits. The Eighth Circuit has also applied this demanding "pleading with particularity" requirement not just to the false claims that were submitted but to the underlying misconduct of Defendants. This decision conflicts with other circuits' decisions which require only that details be given regarding the false claims that were submitted, not the underlying misconduct.

The courts of appeals are also split and considerably uncertain, as noted in section IX.A. *supra*, regarding the existence of and nature of any materiality requirement. The Eighth Circuit noted this split in the decision in the instant case:

> The existence of and appropriate standard for a materiality element is a matter of some disagreement in the courts. *See, e.g.*, *United States, ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415-16 (3d Cir. 1999) (declining to decide whether such an element exists because the claims at issue would easily qualify); *United States v. Southland Mgmt. Corp.*, 288 F.3d 665, 674-78 (5th Cir.) (questioning existence of materiality element, but finding that false certification of compliance with condition required for payment satisfied even strict outcome materiality standard), reh'g en banc granted, 307 F.3d 352 (5th Cir. 2002); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (applying materiality requirement that depends on "whether the false statement has a natural tendency to influence agency action").

United States ex rel. Costner v. United States, 317 F.3d 883 (8th Cir. 2003). App. 1-11.

X. CONCLUSION

The instant case raises several important legal questions as to how the federal False Claims Act should be interpreted. This interpretation will impact many cases nationwide. These issues include whether or not the government or a *qui tam* plaintiff must demonstrate the materiality of a defendant's false claims in order to recover under the Act; what level of detailed knowledge must be possessed and pled regarding the false claims to satisfy the particularity requirement of Rule 9(b); and whether and under what circumstances knowledge of the false claims on the part of government officials demonstrates that a defendant lacks the intent, scienter and knowing state of mind required to establish liability. Given the public importance of false claims litigation, which has already recovered billions of dollars for the federal treasury, and has deterred even greater losses from false claims by government contractors, and given that the issues to be settled in this case are central to the future effectiveness of the Act in achieving the Congressional intent, the

Petitioners respectfully urge this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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United States Court Of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3764

United States of America ex rel. Pat Costner; Sharon Golgan; Carolyn Lance; Debra Litchfield; Becky Summers; Kenny Brown; Edward Campbell; Don Daniel; Jeffrey Foot; David Hermanson; Arkansas Peace Center; Vietnam Veterans of America, Arkansas State Council, Inc.,	* * *

Before WOLLMAN, FAGG, and LOKEN, Circuit Judges.

WOLLMAN, Circuit Judge.

This is a *qui tam* action brought on behalf of the United States by the plaintiffs as relators pursuant to the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. The complaint alleges that URS Consultants, Inc. (URS), Morrison Knudsen Corporation (MK), MRK Incineration, Inc. (MRK), and Vertac Site Contractors (VSC) conspired to submit false claims for payment under a government contract for the treatment and disposal of hazardous waste at the Vertac Chemical Plant site in Jacksonville, Arkansas. The plaintiffs appeal the district court's[1] judgment in favor of the defendants. We affirm.

I.

The plaintiffs filed this False Claims Act suit in 1995. The suit arises out of the defendants' contract with the Environmental Protection Agency to clean up a contaminated industrial site known as the Vertac site. We set out the history of the site and this litigation in a prior appeal:

> From 1948 to 1987, the Vertac site was home to various chemical, herbicide, and pesticide production facilities. Throughout the years, chemical waste from such activity was deposited in landfills and stored in drums or barrels above ground

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[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

with little or no attention to human health or environmental consequences. As a result, the site became extremely contaminated with dioxin and other highly toxic chemicals. The United States Environmental Protection Agency (EPA) has placed the site on the Superfund National Priorities List.

. . .

Substantial cleanup began in 1987, following Vertac Chemical's abandonment of the site. After learning that approximately 28,000 corroding and leaking drums of toxic waste had been left on the premises, the EPA initiated an emergency removal action pursuant to section 9604 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1995 & Supp.1998). The state then negotiated a contract for on-site incineration of the waste with MRK Incineration, Inc., which subsequently assigned the contract to Vertac Site Contractors, a joint venture composed of MRK and MK Environmental Services, a division of Morrison Knudsen Corp.

. . .

Pursuant to the agreement, the state imposed various conditions regarding the operation of the incinerator constructed by the contractors, but certified that the contractors had demonstrated the ability to satisfy state and federal regulations. In 1991, the district court approved and entered an additional consent decree. The EPA remained involved in the cleanup by monitoring air quality, handling and transporting the drums of waste to be incinerated by the contractors, and disposing of incinerator ash.

> In 1992, after it became clear that the trust fund would not be sufficient to complete the cleanup, the EPA assumed primary responsibility for the site and approved a federal removal action using federal funds. When the trust fund was depleted, the state terminated its contract with Vertac Site Contractors. Soon after, the EPA assigned general oversight authority of the site to URS Consultants, Inc. URS then entered into a contract with Vertac Site Contractors to continue incineration activities. In 1995, the EPA transported the remaining drums of toxic waste to a site in Kansas for incineration.

Costner v. URS Consultants, Inc., 153 F.3d 667, 671-72 (8th Cir. 1998) (citations omitted) (Costner I).

The EPA assumed responsibility for the project on June 8, 1993. The EPA executed an agreement with URS, giving URS general oversight authority over the incinerator and authorizing it to contract with VSC to continue VSC's incineration operations. From the start of the cleanup, the EPA had a Remedial Project Manager, a team of engineers, a risk assessment specialist, and other scientists assigned to the site. URS and VSC produced daily, weekly, and monthly reports concerning site operations, as well as air monitoring reports, quality assurance reports, and other regulatory compliance reports. In response to allegations made by the plaintiffs and others during the course of operations, the EPA conducted investigations into intentional tampering and regulatory violations. The investigators suggested improvements, improvements were made, and the EPA continued to make payments under the contract.

The plaintiffs allege that before and during the course of the contract the defendants concealed operational

problems and numerous regulatory violations from the EPA. They contend that in light of this concealment the defendants' requests for payment constituted false claims under the FCA. After extended discovery, the district court granted summary judgment to the defendants on all claims except those that alleged tampering with monitoring devices. The district court then dismissed certain of the tampering claims, finding they had been pled with insufficient particularity. After trial on the remaining two tampering claims, the district court entered judgment in favor of the defendants on all claims.

II.

We review the district court's grant of summary judgment *de novo,* applying the same standards as the district court and viewing the evidence in a light favorable to the nonmoving party. *Hammond v. Northland Counseling Ctr., Inc.,* 218 F.3d 886, 891 (8th Cir. 2000). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the party moving for summary judgment has demonstrated that the record contains no genuine issue on a material fact, the burden is on the nonmoving party to present affirmative evidence raising a genuine issue as to that fact. *Hammond,* 218 F.3d at 891 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)).

A. Materiality

The False Claims Act imposes liability on "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government

. . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). In addition, several courts have required that the falsehood in the claim must be material to the payment decision. The district court dismissed all but two of the plaintiffs' claims for failure to present affirmative evidence raising a genuine issue of material fact regarding the materiality of the defendants' alleged misstatements and omissions. The existence of and appropriate standard for a materiality element is a matter of some disagreement in the courts. *See, e.g., United States, ex rel. Cantekin v. Univ. of Pittsburgh,* 192 F.3d 402, 415-16 (3d Cir. 1999) (declining to decide whether such an element exists because the claims at issue would easily qualify); *United States v. Southland Mgmt. Corp.,* 288 F.3d 665, 674-78 (5th Cir.) (questioning existence of materiality element, but finding that false certification of compliance with condition required for payment satisfied even strict outcome materiality standard), *reh'g en banc granted,* 307 F.3d 352 (5th Cir. 2002); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 785 (4th Cir. 1999) (applying materiality requirement that depends on "whether the false statement has a natural tendency to influence agency action").

Although we have not heretofore directly considered whether a materiality element is implicit in the Act, we have stated that the Act provides recovery from one "who makes a material misrepresentation to avoid paying some obligation owed to the government." *United States v. Q Int'l Courier, Inc.,* 131 F.3d 770, 772 (8th Cir. 1997). Moreover, our decision in *Rabushka ex rel. United States v. Crane Co.* suggests that outcome materiality is the proper standard. 122 F.3d 559, 563 (8th Cir. 1997) ("If Rabushka cannot show that the PBGC would have terminated CF &

I's pension plan [if it had known of the misrepresentations and nondisclosures], then there is no false claim because . . . liabilities would have occurred regardless of Crane's actions."). In our prior decision in this case we implied a materiality standard stricter than mere relevancy: "only those actions by the claimant which have the purpose and effect of causing the United States to pay out money it is not obligated to pay . . . are properly considered 'claims' within the meaning of the FCA." *Costner I,* 153 F.3d at 677. We need not decide the precise contours of the materiality requirement, however, because we hold that the plaintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision.

In rejecting most of the plaintiffs' claims, the district court found that although the EPA undisputably was informed of the operational problems from at least three sources, it nonetheless continued to approve monthly payments. The record contains extensive documentation revealing the inspections conducted by the EPA, the reports sent to the EPA by the defendant contractors and on-site EPA personnel, and the information obtained by the EPA through the plaintiffs' previous lawsuits and other complaints. The EPA did not consider the operational difficulties encountered by the defendants to be contractual violations. The EPA worked with the defendants to resolve problems as they arose and to improve the efficiency of the process. The plaintiffs argue that the EPA was unaware of the extent of the problems and that complete knowledge would have been material to the payment decisions. Only with respect to the allegations of tampering with the PT-125 kiln draft monitor did the

plaintiffs produce evidence that the EPA's payment decision would have probably been affected if it had known of a particular omission. Accordingly, the district court did not err in granting summary judgment to the defendants on all but the PT-125 kiln draft monitor claims.

B. Government Knowledge

The EPA's knowledge of operational difficulties also bears on whether the defendants had the requisite intent under the Act. "[I]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim." *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002) (quoting *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 543 (7th Cir. 1999)). A contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required by the Act. *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir. 1995) (citing *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992)). Similarly, we have held that "simple contract breaches . . . cannot provide evidence of a knowing violation of the [False Claims] Act." *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 795 (8th Cir. 2001).

The plaintiffs contend that several of the alleged omissions raise a genuine issue of fact sufficient to preclude summary judgment. First, the plaintiffs cite dioxin levels recorded by on-site air monitors. The record reflects, however, that this data was available to the EPA, although

it was not frequently examined because the EPA did not view production of the data as a required part of the contract. Second, the plaintiffs cite kiln puffs and kiln leaks and the causes thereof. Again, the record reflects that from the beginning the EPA knew of ongoing problems with kiln puffs and kiln leaks. The kiln puffs were cited as the reason the EPA took over cleanup operation from the state. Third, the plaintiffs cite tampering with the stack gas monitors by opening the incinerator rod ports. The EPA's on-site Remedial Project Manager testified that the rod ports were regularly opened for maintenance purposes during incineration operations. The plaintiffs have directed us to no evidence that the rod ports were open for an improper purpose. Fourth, the plaintiffs cite the defendants' 1994 OSHA violations. The record shows that the EPA discussed these problems with the defendants and referred the matter to OSHA for investigation and possible sanctions. Although the record indicates that the defendants' performance under the contract was not perfect, the extent of the government's knowledge through its on-site personnel and other sources shows that, as in *Durcholz,* the "government knew what it wanted, and it got what it paid for." *Durcholz,* 189 F.3d at 545. Thus, the district court did not err in finding that the defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues.

C. Rule 9(b) Particularity

We review *de novo* the district court's dismissal of a claim for failure to plead with particularity. *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.,* 48 F.3d 1066, 1069 (8th Cir. 1995). A complaint alleging violations of the

False Claims Act must be pled with particularity pursuant to Rule 9(b). *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (5th Cir. 1999). This particularity requirement demands a higher degree of notice than that required for other claims. The claim must identify who, what, where, when, and how. *Parnes v. Gateway 2000, Inc.,* 122 F.3d 539, 550 (8th Cir. 1997) (applying Rule 9(b) to a securities fraud claim). Rule 9(b) is to be read in the context of the general principles of the Federal Rules, the purpose of which is to simplify pleading. Thus, the particularity required by Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations. *Abels v. Farmers Commodities Corp.,* 259 F.3d 910, 920-21 (8th Cir. 2001).

The only claims that survived the district court's rulings on materiality and scienter were those relating to allegations of intentional tampering with the PT-125 kiln draft monitor, a measuring device on the waste incinerator. After five years of discovery, the plaintiffs alleged that tampering occurred once on July 14, 1992, once in mid-July 1993, and on other unspecified occasions. The alleged illegal act is the omission of a material fact in a claim for payment. To defend against the charge, the defendants must either dispute the occurrence of the alleged acts or attempt to prove that they adequately disclosed the acts to the government. Because the plaintiffs did not provide any information regarding the identity of those who allegedly tampered with the monitors or when such tampering occurred, the complaint is "not specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they

have done anything wrong." *United States ex rel. Lee v. SmithKline Beecham Clinical Labs.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001). Without information as to who tampered with the monitors and how and when the tampering occurred, the defendants would be largely unable to respond with contemporaneous witnesses and documents and expert witnesses to testify as to whether the monitoring data is consistent with tampering of the sort alleged to have occurred. Thus, the district court did not err in dismissing the claim of tampering on unspecified occasions and allowing the plaintiffs to proceed to trial only on the claims of tampering on July 14, 1992, and mid-July 1993.

We find the plaintiffs' remaining arguments to be without merit.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES, ex rel.,
PAT COSTNER, SHARON GOLGAN,
CAROLYN LANCE, DEBRA LITCHFIELD,
BECKY SUMMERS, KENNY BROWN,
EDWARD CAMPBELL, DON DANIEL,
JEFFREY FOOT, DAVID HERMANSON,
ARKANSAS PEACE CENTER,
AND VIETNAM VETERANS
OF AMERICA, ARKANSAS
STATE COUNCIL, INC. **PLAINTIFFS**

VS. **NO. 4:95CV448 JMM**

URS CONSULTANTS, INC.,
MORRISON KNUDSEN
CORPORATION, MRK
INCINERATION, INC., AND VERTAC
SITE CONTRACTORS **DEFENDANTS**

ORDER

(Filed Oct. 22, 2001)

This is a *qui tam* action brought on behalf of the United States[1] by Plaintiffs/Relators ("Plaintiffs") pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* Following a grant of partial summary judgment, the Court heard evidence on two issues: (1) whether tampering with the PT-125 occurred on July 14, 1992 and mid-July, 1993 as testified to by Mr. Don Daniel in his deposition and (2) whether defendants had the requisite knowledge of the

[1] The United States has declined to intervene.

tampering required by the False Claim Act. After carefully reviewing the transcripts of the trial on these issues and the post trial briefs filed by the parties, the Court finds that the plaintiffs have failed to sustain their burden of proof on either issue and the complaint will be dismissed in its entirety.

On the issue of whether tampering with the PT-125 occurred on any of the pertinent dates, plaintiffs relied heavily on the testimony of Don Daniel. Daniel's claim that he tampered with the PT-125 to reduce the occurrence of waste feed cutoffs is not credible and lacks support from any other probative evidence presented at the trial.

Daniel's demeanor on the witness stand did not promote confidence in his testimony and he was easily led into numerous inconsistencies by counsel for both sides. On cross-examination, it was established conclusively that Daniel has given numerous conflicting versions of his tampering beginning with an affidavit and proceeding through two statements to a government investigator, his deposition, and then his trial testimony.

His lack of familiarity with the instruments in question and the effect of changing the calibration in the manner he described gives the Court no hesitancy in completely discrediting his testimony.

Furthermore, Daniel's different versions of the tampering were contradicted by all of the other witnesses and by the contemporaneous site records and historian data. Although Daniel testified that all of the control room operators and technicians knew what he was doing, no witness would confirm his claims of tampering. The site records, which reflect Daniel's activities on the dates in question, do not contain any entry that he performed any

task on the PT-125. Finally, the historian data which records the performance of the incinerator shows no evidence that tampering of the instruments was occurring.

Defendants also presented credible evidence from operators and engineers that, if tampering had occurred as described by Daniel, the effects on the incinerator would have caused emissions that would have been readily observable and that no such events happened.

Daniel's assertion that he altered priority settings on the Turnbull Control System is likewise not credible. Daniel admitted he never changed the interlock settings for automatic waste feed cutoffs. Moreover, every knowledgeable witness testified that priority settings did not affect waste feed cutoffs or regulatory compliance, but rather only controlled the annunciation of the alarms.

Plaintiffs' case also fails on the second prong that defendants had the requisite knowledge of the alleged tampering. The False Claims Act defines "knowing" and "knowingly" as: (1) "having actual knowledge of the information", (2) acting "in deliberate ignorance of the truth or falsity of the information", or (3) acting "in reckless disregard of the truth or falsity of the information". 31 U.S.C. § 3729(b).

The Court finds that neither URS Consultants, Inc. ("URS") nor Vertac Site Contractors ("VSC") had actual knowledge of the alleged tampering. Plaintiffs conceded that URS had no actual knowledge, and, although Daniel testified that his immediate supervisors were aware of his action, the overwhelming evidence was to the contrary. The only supervisor called by the plaintiffs specifically denied any knowledge and all of the VSC personnel consistently and credibly denied any knowledge.

The Court further finds that neither defendant acted with "reckless disregard" of any alleged tampering. Gentry and Associates was hired as an oversight contractor to perform inspection services continuously on site. The Gentry inspector, John Gillette, testified that he "never saw any evidence of tampering" while he worked at the site. Defendants instituted numerous procedures to safeguard against improper operation of the incinerator which was persuasive evidence of their vigilance and refutes any contention of a reckless disregard of misconduct.

Plaintiffs argue that there were "clues" which should have placed defendants on notice that something was amiss and prompted further investigation. These "clues" were argued to be historian data readings and elevated dioxin levels. Because all of the witnesses consistently offered alternative reasons for erratic PT-125 readings, the Court finds that the historian data reading has no probative value to prove knowledge or reckless disregard. Likewise, the elevated readings of dioxin at the site are attributable to numerous causes other than kiln puffs and tampering, thus, this evidence was of minimal significance to the issues to be resolved.

In accordance with the foregoing discussion, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. From 1948 through 1987, the Vertac Site was home to various chemical, herbicide, and pesticide production facilities. Following abandonment of the site in 1987, EPA initiated an emergency removal action under the Comprehensive Environmental Response, Compensation

and Liability Act ("CERCLA") to dispose of the approximately 28,000 drums of waste remaining on site.

2. Initially, the State of Arkansas contracted for performance of the cleanup, although EPA chose the remedy of on-site incineration. In 1989, the Arkansas Department of Pollution Control and Ecology ("ADPC & E") negotiated a contract for the on-site incineration of the chemical waste with MRK Incineration, Inc., which later assigned the contract to Vertac Site Contractors. The State of Arkansas paid for this portion of the cleanup from a privately-funded trust fund that resulted from litigation against one of the parties responsible for the contamination.

3. During the summer of 1992, ADPC & E recognized that the trust fund was insufficient to complete incineration of the waste. Consequently, EPA assumed primary responsibility for the performance of the ongoing response action. EPA determined that the threat of release posed by the continuing deterioration of the on-site drums containing the waste warranted continuation of the on-site incineration as the safest, most expedient way in which to dispose of the waste.

4. EPA formally assumed responsibility for the incineration project on June 8, 1993, when URS and EPA executed a Work Assignment Form under their pre-existing umbrella contract for Superfund remediation-related work within EPA Region VIII (the "ARCS" Contract). These instruments assigned URS the general oversight authority over the incinerator activities at the site. EPA also authorized URS to enter into a sole source contract with VSC, which allowed VSC to continue its incineration operations at the site.

5. EPA participated at the Vertac Site from the inception of the cleanup. EPA had a Remedial Project Manager assigned to the site, as well as a team of engineers, a risk assessment specialist and other scientists. During the period of the State's contract, EPA regularly communicated with the State and had access to the documents concerning the State contract and the performance of the incinerator. EPA also reviewed State reports concerning the site and conducted regular discussions with State personnel about various aspects of the operation. EPA was present for both trial burns.

6. Shortly after the June 8, 1993 assumption of the incineration operations, EPA sent another of its experts, Catherine Massimino, a Senior RCRA/Superfund Technical Specialist for EPA Region 10, to conduct a review of the incinerator. Ms. Massimino produced a written report on July 13, 1993, which addressed both general operational issues at the site and the allegations that site workers had made to EPA through their attorneys in May of 1993.

7. Also following June 8, 1993, URS and VSC provided EPA with multiple reports of the site operations, including: daily reports; weekly reports (which included daily reports, shift engineer reports, unusual incident reports, and photographs); monthly reports; special reports authorized by Work Assignment Forms as to individual aspects of the incineration operations; RCRA compliance audit reports; quality assurance reports; payment reports; fee award reports; and air monitoring reports. URS's shift engineers were present on-site 24 hours per day, and their contemporaneous shift reports were included in the reports to EPA.

8. During the performance of the Vertac on-site incineration, EPA was aware of the allegations made by plaintiffs in this lawsuit, including those relating to tampering with the computer monitoring equipment. EPA conducted numerous investigations of these allegations. Despite plaintiffs' allegations and its investigations, EPA continued with the contract and continued to make payment under the contract.

9. The PT-125 sensor was located at the back of the kiln and measured the draft in the kiln in inches of water column ("w.c."). It then transmitted an electrical current signal to the computer monitoring system in a range of 4 to 20 milliamps. The kiln operated at a negative pressure. When the signal sent by the PT-125 reached a pre-established set point, or "interlock," which indicated that the kiln was approaching positive pressure, the system would initiate an automatic waste feed cutoff.

10. If properly calibrated at zero draft, the electrical signal from the PT-125 should read 4 milliamps. Proper calibration of the PT-125 was as follows: 0"w.c.= 4 milliamps; .5" w.c. = 8 milliamps; 1"w.c. = 12 milliamps; 1.5" w.c. = 16 milliamps; and 2" w.c.= 20 milliamps.

11. Mr. Daniel testified that he tampered with the PT-125 on July 14, 1992 and, during his last days on the site, July 18-20, 1993. Mr. Daniel stated that he miscalibrated the PT-125 in order to stop the occurrence of waste feed cutoffs caused by the PT-125 reaching its interlock point.

12. The amount by which Mr. Daniel testified he elevated the zero changed throughout the case. Prior to trial, Mr. Daniel described elevating the zero as setting the PT-125 so that 1" water column read as zero pressure;

setting the PT-125 so that 1½" water column read as zero pressure; or setting the PT-125 so that .5" water column read as zero pressure.

13. At trial, Mr. Daniel testified that he elevated the zero so that 0" water column equated with a milliamp reading of 8 milliamps.

14. At different times during the proceedings, Mr. Daniel also provided different versions of the manner in which he claimed to have tampered with the PT-125. Prior to trial, Mr. Daniel described a more "formal" calibration process which involved resetting the PT-125 calibration on the device. During trial, he testified that he also used a less formal means of tampering in which he used a screwdriver to adjust the zero. When asked how often he used this less formal method of tampering, Mr. Daniel stated "Several. Many times."

15. Daniel testified at trial that when tampering with the PT-125 he adjusted the zero by ½ inch.

16. Mr. Daniel stated that his "best estimate" of the date of tampering in 1992 was July 14, 1992. To the best of his recollection, Mr. Daniel stated that on that date he elevated the zero by way of the less formal method of tampering, the screwdriver method, in order to avoid waste feed cutoffs.

17. Mr. Daniel also described historian graphs for July 14, 1992. (The historian provided a contemporaneous computer record of kiln operating conditions). Mr. Daniel described one graph for July 14, 1992 as depicting data that resembled an adjustment on the PT-125. This data appeared at 23:15 on July 14, 1992.

18. Mr. Daniel worked from 6:45 to 15:40 on July 14, 1992.

19. Mr. Daniel was not working on July 14, 1992 at 23:15 hours.

20. Based on the Control Room Operators Logbook and eyewitness testimony, no Instrument and Electrical Technician worked on the PT-125 during Mr. Daniel's July 14, 1992 shift. Mr. Robert Thornton, the Control Room Operator on duty during Mr. Daniel's July 14, 1992 shift testified that he did not call Mr. Daniel or any other technician to make any adjustment to the PT-125 during that shift.

21. The Event Log, which recorded waste feed cutoffs from the computer, reflects that waste feed cutoffs for PT-125 were minimal during Mr. Daniel's shift on July 14, 1992. Thus, the asserted motivation for Mr. Daniel's tampering activities – a cessation of continuing automatic waste feed cutoffs caused by positive kiln draft – did not exist during Mr. Daniel's shift on July 14, 1992.

22. Had Mr. Daniel tampered with the PT-125 as he testified, one would expect automatic waste feed cutoffs to have ceased after his shift ended. They did not. Instead, problems with PT-125 waste feed cutoffs worsened after Mr. Daniels July 14, 1992 shift and were not resolved until other technicians investigated and fixed the problems with the PT-125's operations.

23. The evidence, consisting of credible eyewitness testimony and contemporaneous records, establishes that Mr. Daniel did not tamper with the PT-125 during his shift on July 14, 1992 in order to stop waste feed cutoffs caused by the PT-125.

24. The contemporaneously recorded computer records from the site do not contain any evidence of tampering with the PT-125 on July 14, 1992.

25. VSC's project manager, Robert Apa, described the historian data as it was recorded during Mr. Daniel's shift on July 14, 1992. Mr. Apa compared the historian data for the PT-125 sensor to the non-regulatory PT-225 sensor. He explained that due to the proximity of these two sensors, one would expect both sensors to respond to operating conditions in the incinerator in a similar fashion. If Mr. Daniel artificially manipulated the PT-125, that manipulation would also alter the relationship between the PT-125 and the PT-225. Mr. Apa demonstrated that, throughout July 14, 1992, a strong correlation remained between the two sensors, thereby negating the existence of tampering. The Court finds that Mr. Apa was a credible and knowledgeable witness.

26. The only upward spike in the PT-125 on July 14, 1992 that Plaintiffs cite, at 23:15 hours, occurred after Mr. Daniel's shift and was attributable to regular maintenance issues.

27. Mr. Daniel testified that he worked for three hours during the morning of July 18th or 19th and returned for the night shift. He claimed to have adjusted the PT-125 improperly using a screwdriver.

28. Mr. Daniel did not work on the PT-125 during the July 18-20, 1993 time period.

29. The contemporaneous site records demonstrate that no work was performed on the PT-125 during Mr. Daniel's shifts July 18-20, 1993.

30. To the extent that the operational site records reflect PT-125 cutoffs prior to Mr. Daniel's shifts on these dates, the records set forth the reasons for the cutoffs and do not provide any evidence of tampering with the device.

31. Mr. Apa described the historian data as recorded during Mr. Daniel's shifts on July 18-20, 1993. Mr. Apa compared the historian data for the PT-125 to that of the PT-225. Mr. Apa testified that there is no step increase in the PT-125 graph, and there is nothing in the historian data that suggests tampering during these shifts.

32. Mr. Winchester, who designed and installed the computer monitoring system also analyzed the historian data from the mid July 1993 time period. Mr. Winchester testified that there was no evidence of a miscalibration of PT-125.

33. In addition to the records for July 14, 1992 and July 18-20, 1993, Defendants examined the site records for all the dates in July 1992 and July 1993 on which Mr. Daniel worked. None contained evidence of tampering with the PT-125.

34. Had Mr. Daniel miscalibrated the PT-125 as he claimed, many other persons at the site would have witnessed the tampering or its effects. Plaintiffs were unable to present any eyewitness testimony to corroborate Mr. Daniel's allegations.

35. Mr. Daniel claimed that all of the other instrument and electrical technicians knew about and participated in the tampering. Mr. Daniel also described the miscalibration process in terms that would have required the Control Room Operators to participate in the miscalibration.

36. No other witness confirmed Mr. Daniel's version of events.

37. Munro ("Buck") Tucker was a Control Room Operator at the Vertac Site. Mr. Tucker testified that he did not instruct Mr. Daniel to elevate the zero nor does he have any personal knowledge of any tampering or miscalibration event.

38. Greg Price, an Instrument and Electrical Technician, testified that he never elevated the zero. He also stated that he has no personal knowledge of anyone at the site elevating the zero.

39. Art Bates, an Instrument and Electrical Technician, testified that he did not tamper with the incinerator or know of anyone else doing so.

40. Daniel Fuller, the Operations Manager at the site from August 1991 through June 3,1993, testified that he did not recall instructing Don Daniel or any other Instrument and Electrical Technician to recalibrate the TCS or to improperly recalibrate the PT-125.

41. Brent Weddle, a former maintenance worker, testified that he understood he would have lost his job had he tampered with the PT-125.

42. Robert Thornton, the Control Room Operator on duty on July 14, 1992, denied involvement in or knowledge of any tampering or miscalibration activities at the site.

43. Joey Moses, an Instrument and Electrical Technician, specifically accused by Mr. Daniel of participating in the alleged tampering, denied Mr. Daniel's allegations. Mr. Moses testified that he did not participate in any

tampering or miscalibration activities and he did not have any knowledge of anyone else at the site doing so.

44. URS Shift Engineers Robert Rooke and James Winchester, as well as VSC's Site Manager, Robert Apa, described the impact of a miscalibration of the sort describe by Mr. Daniel. They noted that if the incinerator operated at a draft level lower than the true zero, there would have been positive pressure, causing a kiln puff. Thus, even had Mr. Daniel miscalibrated the PT-125 and avoided waste feed cutoffs, his actions would have produced kiln puffs of significant frequency and duration. Plaintiffs did not produce evidence of this occurring.

45. Mr. Daniel testified that he changed the "priority settings" in the Computer Turnbull Control System ("TCS"). He stated that other workers at the site did so too. He stated that the priority settings determined how often the TSC would process that particular signal. According to Mr. Daniel, the priority settings were improperly lowered from at least July 1992 through July 1993, except for temporary resettings performed in connection with interlock checks. Mr. Daniel also said that when the priority settings were properly set, the incinerator would not operate.

46. Mr. Daniel testified that he never changed the interlock settings for automatic waste feed cutoffs and he did not change the scan time for the TCS.

47. The priority setting controlled the annunciation of the alarms that tell the Control Room Operator of potential problems. Robert Rooke stated that a change in priority would not have affected how often the computer system read the signal for any particular parameter but would only have affected the manner in which the alarm

was announced, ie. ringing of a bell or change in the color of the light.

48. This was confirmed by Mr. Winchester.

49. Mr. Daniel also testified in connection with a series of historian data graphs which depicted relatively long periods of time when the PT-125 did not show any movement. These examples were offered to show instances when the priority setting for PT-125 was low due to tampering.

50. Other historian data graphs presented by Mr. Daniel contradict this testimony. Mr. Daniel testified that lowering the priority setting would cause the TCS to overlook the PT-125 sensor, and that this low priority condition lasted for at least one year. Yet, the graphs show that, during the same time period, the historian continued to run and to record repeated movement of readings for the PT-125.

51. All of the Instrument and Electrical Technicians denied that they changed the priority settings. Mr. Fuller, the Operations Manager who allegedly gave Mr. Daniel the instruction to reset the priority, denied doing so.

52. Mr. Daniel described other types of PT-125 tampering that Plaintiffs contend demonstrates that tampering occurred on a routine basis. These were: (1) elevating the zero shortly after PT-125 was officially recalibrated; (2) elevating the zero during a lengthy plant shutdown to avoid showing an improperly elevated draft when the I.D. fan was shut down; and (3) elevating the zero when the kiln was experiencing low kiln draft to avoid PT-125 waste feed cutoffs.

53. Mr. Daniel testified that prior to an official PT-125 calibration test, he and other technicians would reset the PT-125 calibration to the proper level in order the [sic] hide the miscalibration prior to the testing. After the testing, he and other technicians would be called in to re-elevate the zero because the incinerator could not operate when the PT-125 was properly calibrated.

54. This testimony was refuted by other technicians, control room operators, the oversight inspector and by VSC and URS management.

55. Mr. Daniel contended that during a plant shut-down he and other technicians would recalibrate the PT-125 correctly. This practice was followed because PT-125 would incorrectly read an elevated draft during the shut-down, and this reading would reveal the elevated zero practice.

56. This testimony was refuted by other technicians, control room operators, the oversight inspectors and by VSC and URS management.

57. Mr. Daniel testified that he and other technicians would be called on to elevate the zero of PT-125 when the incinerator was experiencing shutdown problems due to low kiln draft. He would then turn the screw of PT-125 until the waste feed cutoffs stopped. No other witness confirmed Mr. Daniels's version of these events.

58. Mr. Apa and Mr. Winchester evaluated the contemporaneous operating records and both concluded that there was no evidence of tampering with the PT-125.

59. Plaintiffs' allegations that the incinerator was operated while the rod ports were open does not show a pattern and practice of tampering.

60. Plaintiffs failed to establish that operation of the incinerator with the rod ports open was a recurring event. In fact, the evidence demonstrated that when this did occur on one occasion, Mr. Apa told the Control Room Operators that such a practice would not be tolerated. In addition, EPA was aware of VSC's practice of opening the rod ports during operations to remove occlusions of salt, and had no objection to this practice.

61. Plaintiffs presented evidence that Mr. Apa directed Instrument and Electrical Technicians to change the cutoff point for the non-regulatory PT-339 sensor prior to the May 13, 1993 salt release. Mr. Apa testified that a non-regulatory cutoff was in place which was engaging due to a salt buildup. After consulting the equipment limitations, the cutoff was raised. Nevertheless, an excessive pressure buildup developed which ultimately damaged the spray dryer and forced a shutdown of the incinerator. Plaintiffs also showed that Mr. Fuller ordered the I.D. fan turned on to cool down the unit. In order to do that, the Instrument and Electrical Technicians had to install "branches" in the PLC Logic, which was normal procedure for a startup. As a result of the decision to activate the I.D. fan, salt was released from the stack on May 13, 1993.

62. EPA investigated this incident. EPA confirmed that the change in the PT-339 cutoff was a non-regulatory event and was consistent with the manufacturers specifications. EPA described the decision to start up the I.D. fan as bad judgment, and approved the operating procedure revisions that VSC implemented to avoid a similar incident. EPA did not find that the event violated applicable contract provisions. EPA did not cite VSC for a regulatory violation. EPA evaluated the impacts of the salt release

and concluded that the contaminants released on May 13, 1993 did not present an unacceptable risk to human health or the environment. The May 13, 1993 salt release does not establish a pattern and practice of tampering.

63. URS did not have actual knowledge of the alleged tampering with the PT-125 or the priority settings. Mr. Daniel testified that URS did not have knowledge of the tampering he alleges, and that, in his view, URS did nothing improper at the site.

64. VSC did not have actual knowledge that the alleged tampering had occurred. Mr. Daniel testified that Bob Apa did not have knowledge of the tampering, and in fact would have never condoned it. Mr. Daniel alleged that his immediate supervisors were aware of his actions, but the only supervisor called by Plaintiffs, Dan Fuller, denied any knowledge.

65. The VSC Project Manager Bob Apa, the VSC Operations Manager Dan Fuller, the Gentry Inspector John Gillette, the URS Site Project Manager Jack Danielson and the URS shift engineers Bob Rooke and James Winchester never heard any allegations or encountered any credible evidence of tampering with either the PT-125 or the TCS system in order to circumvent the regulatory interlocks during operation of the incinerator. Defendants' other witnesses URS Site Engineer Fritz Heneman, Robert Thornton and Joey Moses, confirmed that they were not aware of any evidence of tampering.

66. The record establishes that Defendants did not have actual knowledge of tampering with the PT-125 or any other incinerator devices in order to circumvent applicable regulatory requirements.

67. Plaintiffs did not establish that Defendants acted with reckless disregard.

68. Defendants did not act with reckless disregard with regard to evidence of tampering that should have been apparent from the historian data. Plaintiffs' witnesses described normal operational conditions that would produce the alleged erratic readings of the PT-125.

69. Witnesses identified normal operational causes which would explain instances when the PT-125 would exhibit a draft reading when the system was shut down.

70. Mr. Winchester testified that a positive reading of the PT-125 during a divert situation with the I.D. fan turned off was a natural phenomenon that did not indicate that the instrument sensor was out of calibration.

71. Plaintiffs also assert that differences between the historian data and the westronics "strip chart" should have caused the Defendants to conclude that tampering had occurred. However, testimony explained the reasons for the discrepancies other than tampering.

72. Plaintiffs did not establish that VSC hid its on-site air emissions data because it constituted evidence of tampering.

73. Defendants did not recklessly disregard elevated readings of dioxin levels at the site. The Vertac Site housed various chemical, herbicide, and pesticide production facilities from 1948 through 1987. Air-borne dioxin at the site reasonably could result from wind-blown soil, volatilization of the feedstock into the incinerator, or from salt or ash produced as part of the incineration process. The experts who studied the site for EPA in 1992 did not themselves automatically attribute high dioxin readings to

kiln puffs alone. Accordingly, the existence of air-borne dioxin at the site should not have automatically led Defendants to the conclusion that someone had tampered with the PT-125.

74. At the February 1992 meeting convened by EPA to study the cause of elevated dioxin levels at the site, VSC Project Manager, Bob Apa advised EPA, ADPC & E and the independent consultants that VSC believed four of the five elevated dioxin samples being studied by EPA could be correlated to reported kiln puffs or flame-outs occurring on specific dates.

75. Unlike the URS perimeter air monitors, there was no requirement that VSC report the results of its on-site monitors.

76. As of June 1993, EPA was aware of the VSC on-site monitoring data. On April 21, 1994, William Luthans, Chief of EPA's Arkansas/Louisiana Enforcement Section wrote to the local newspaper explaining the differences between the VSC monitoring data and the EPA ambient air action levels. Mr. Luthans explained that because the VSC monitors are located adjacent to the incinerator, they cannot be compared to the EPA ambient air monitoring action levels which are levels established to protect the community beyond the fenceline who may be exposed twenty-four hours a day, seven days a week.

77. Further, even during the time period when the State of Arkansas had lead responsibility for the incineration, EPA used VSC's operations logs and other site reports to understand and interpret the URS perimeter air monitoring data.

78. The evidence does not show a deliberate effort on the part of VSC to hide its on-site air monitoring data, or other data.

79. In order to ensure continuous and consistent inspection services during its transition as EPA oversight contractor, URS subcontracted with the State's oversight contractor, Gentry & Associates to continue performing inspection services at the site for a transitional period after June 1993. While under contract with URS, the Gentry inspectors were required to provide 24-hour per day inspection services. The Gentry inspectors filled out daily logs, unusual incident reports and photographed conditions at the site. EPA received copies of all of Gentry's documentation.

80. John Gillette, a Gentry Inspector, testified that he never saw any evidence of tampering.

81. URS Shift Engineer, James Winchester, testified that he regularly checked the reading of the magnehelic gauge against the PT-125 reading in the Control Room. He watched the screen readings in the Control Room. He compared the historian data to the strip chart. He looked for signs of tampering but found none.

82. Mr. Winchester also participated in URS's investigation and reports to EPA as to the causes of kiln puffs, waste feed cutoffs and diverts. Throughout all of this study, Mr. Winchester did not identify an incident in which a kiln puff, divert, or similar occurrence went unreported, or in which tampering was implicated.

83. URS Shift Engineer, Robert Rooke, also cross checked the magnehelic gauge with the PT-125, compared historian data to the strip chart readings and investigated

rumors. He found no evidence of miscalibration of the PT-125.

84. Bob Apa also testified that he looked out for signs of tampering at the site, walked the site, and made inspections. He never received any information that anyone tampered with the PT-125.

85. VSC also employed an on-site compliance officer who monitored the performance of the incinerator for compliance, including regular interlock checks.

86. EPA representative, Richard Ehrhart testified in his deposition which was received in evidence that URS maintained a number of different logs and reports which would enable one to corroborate whether a specific event occurred. In addition, he testified that he had no reason to believe that URS or VSC knowingly and intentionally submitted false statements to the EPA. Mr. Ehrhart testified that he did not feel misled by URS or by VSC with regard to fugitive emissions, medical monitoring data, blood test data or other exposure data.

87. Mr. William Luthans of the EPA stated by way of deposition admitted at trial that he did not receive any information that URS or VSC withheld or falsified information.

88. Plaintiffs failed to prove their underlying theory that design defects made the alleged tampering a necessity in order to operate the incinerator. In February, 1992, the EPA assembled a group of incineration experts to evaluate the Vertac incinerator. The report summarizing the evaluation revealed that the Vertac incinerator system as a whole was well designed and properly operated. In addition, in March 1992, the EPA stated that the Vertac

incinerator employed state of the art equipment and was fully in compliance with regulations governing hazardous waste incinerators.

89. Plaintiffs also failed to tie their allegations of design defects to the claimed tampering. Mr. Rooke testified that the problems noted with the incinerator would not have been remedied by the alleged tampering with the PT-125.

90. There was no tampering with the PT-125 on the Vertac incinerator in order to circumvent regulatory or contractual requirements.

91. Employees of defendants did not tamper with the PT-125 sensor in order to bypass the regulatory interlocks required of the incinerator on July 14, 1992.

92. Employees of defendants did not tamper with the PT-125 sensor in order to bypass the regulatory interlocks required of the incinerator during mid-July of 1993.

93. Defendants did not have knowledge, actual or otherwise, of the tampering with the PT-125 sensor that is alleged by plaintiffs in this case.

94. Defendants did not knowingly, as that term is defined in the FCA, submit false claims for payment or false statements to EPA in order to obtain payment of the contract amounts or to avoid other obligations to the government.

CONCLUSIONS OF LAW

1. An FCA relator must prove by a preponderance of the evidence that the defendant knowingly submitted a false claim or statement to the federal government for the

purpose of obtaining payment from the government or for decreasing an obligation owed to the federal government. The term "knowingly" encompasses actual knowledge, reckless disregard of the truth, or intentional ignorance of the truth.

2. None of the defendants knowingly submitted a false claim or statement to the government related to the two instances of tampering to the PT-125 described by relator Don Daniel.

3. None of the defendants knowingly submitted a false claim or statement to the government with respect to their performance of remediation work at the Vertac Site.

4. Plaintiffs are not entitled to any adverse inferences and have not presented any evidence from which knowledge of falsity or intent to submit a false claim may be inferred.

CONCLUSION

It is therefore ordered that Plaintiffs' complaint be dismissed as to Defendants' URS Consultants Inc., Morrison Knudsen Corporation and Vertac Site Contractors. The Court will address Plaintiffs' motion for default judgment (docket # 307) against Separate Defendant, MRK Incineration, Inc., by separate order.

IT IS SO ORDERED this 19 day of October, 2001.

/s/ James M. Moody
James M. Moody
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES, ex rel.,
PAT COSTNER, SHARON GOLGAN,
CAROLYN LANCE, DEBRA LITCHFIELD,
BECKY SUMMERS, KENNY BROWN,
EDWARD CAMPBELL, DON DANIEL,
JEFFREY FOOT, DAVID HERMANSON,
ARKANSAS PEACE CENTER,
AND VIETNAM VETERANS
OF AMERICA, ARKANSAS
STATE COUNCIL, INC. **PLAINTIFFS**

VS. **NO. 4: 95CV448 JMM**

URS CONSULTANTS, INC.,
MORRISON KNUDSEN
CORPORATION, AND
VERTAC SITE CONTRACTORS **DEFENDANTS**

JUDGMENT

(Filed Oct. 22, 2001)

Pursuant to the Order entered this date, Plaintiffs' Complaint is hereby dismissed as to the above named Defendants.

IT IS SO ORDERED this 19 day of October, 2001.

/s/ James M. Moody
James M. Moody
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3764

United States of America ex rel. Pat Costner, et al.,	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	*	
United States of America,	*	
Movant,	*	
URS Consultants, Inc., et al.,	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

April 9, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

False Claims Act 31 USCA Sec. 3729, et seq.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of

the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

TITLE 31. MONEY AND FINANCE SUBTITLE III. FINANCIAL MANAGEMENT CHAPTER 37. CLAIMS SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS § 3730 (1994)

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such

motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the

action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with

respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *qui tam* plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and

damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent

knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS § 3731 (1994)

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS § 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction

as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

(2)

No. 03-65

Supreme Court, U.S.
FILED
AUG 11 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES, ex rel., PAT COSTNER, ET AL.,
Petitioners,

v.

URS CONSULTANTS, INC., MORRISON KNUDSEN CORPORATION, MRK INCINERATION, INC. AND VERTAC SITE CONTRACTORS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Eighth Circuit Court of Appeals, which (i) recognized that materiality is an implicit element of a False Claims Act violation; (ii) evaluated, based on the facts before it, whether Respondents' cooperation with the government agency and disclosure of problems with the contract's performance negated the element of intent; and (iii) required Petitioners, with the benefit of five years of discovery, to plead their fraud case with particularity, creates a conflict with decisions of this Court or with the other circuit courts of appeal concerning the False Claims Act.

CORPORATE DISCLOSURE STATEMENT FOR RESPONDENTS URS CONSULTANTS, INC., MORRISON KNUDSON CORPORATION AND VERTAC SITE CONTRACTORS

Pursuant to Supreme Court Rule 29.6, Respondents URS Consultants, Inc. ("URS"), Morrison Knudson Corporation ("MK") and Vertac Site Contractors ("Vertac") respectfully submit their Corporate Disclosure Statements:

URS Corporation is the parent of URS Consultants, Inc., a Delaware Corporation and a wholly-owned subsidiary. No publicly-held company owns 10 percent or more of URS's stock.

MK is an entity wholly owned by Washington Group International, Inc. (Ohio). MK is not a separate corporate entity that is traded on a stock exchange; therefore, no company (other than Washington Group International, Inc. (Ohio)) owns 10 percent or more of the stock of the company.

Vertac is a joint venture between Morrison Knudson Corporation and MRK Incineration, Inc. Each entity owns a one-half interest in Vertac.

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IN THE

Supreme Court of the United States

No. 03-65

UNITED STATES, ex rel., PAT COSTNER, ET AL.,
Petitioners,

v.

URS CONSULTANTS, INC., MORRISON KNUDSEN CORPORATION, MRK INCINERATION, INC. AND VERTAC SITE CONTRACTORS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1-11) is reported at *United States ex rel. Costner v. United States,* 317 F.3d 883 (8th Cir. 2003).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on January 28, 2003 and denied rehearing on April 9, 2003. The Petitioners filed this Petition on July 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

INTRODUCTION

The False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA" or "Act"), imposes liability on any person who presents a false or fraudulent claim for payment, or makes a false statement in support of a claim for payment, to the United States Government. Passed in 1863 as a response to defense contractor fraud during the Civil War, the Act has developed a large body of jurisprudence.

In 1995, Petitioners filed a *qui tam* complaint against Respondent environmental remediation contractors. The United States declined to intervene. Following five years of discovery and two weeks of trial, the District Court, as affirmed by the Eighth Circuit Court of Appeals, found that Petitioners had failed to state a claim under the Act and prove their case in every respect. *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003) (Pet. App. 1-11). To reach its decision, the Eighth Circuit applied long-standing FCA precedent to the facts before it. The Eighth Circuit's decision does not create new FCA law and it does not contradict cases of this Court or of its sister courts of appeals.

STATEMENT

A. PROCEDURAL HISTORY

This FCA case arises from Respondents' environmental remediation of the Vertac Superfund Site in Jacksonville, Arkansas. From 1948 through 1987, the Vertac Site was home to various chemical, herbicide, and pesticide production facilities. Following abandonment of the Site in 1987, EPA initiated an emergency removal action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to dispose of the approximately 28,000 drums of dioxin-contaminated waste remaining on site. Pet. App. 3.

In 1989, the Arkansas Department of Pollution Control and Ecology ("ADPC&E") contracted for the on-site incineration of the chemical waste with MRK Incineration, Inc., which subsequently assigned the contract to Respondent Vertac Site Contractors ("VSC"). Pet. App. 3. During the summer of 1992, ADPC&E recognized that its funds were insufficient to complete incineration of the waste. Consequently, EPA assumed primary responsibility for the performance of the ongoing response action. EPA hired Respondent URS Consultants, Inc. ("URS") as its oversight contractor, and VSC was retained as the subcontractor to continue the incineration. Pet. App. 4.

By the time EPA had taken over the incineration operations in 1993, many of the Petitioners had already filed a number of unsuccessful lawsuits and had instigated multiple investigations by EPA and the State concerning their allegations of wrongdoing at the Site. Undeterred, Petitioners filed this suit in 1995. Petitioners charged that VSC and URS fraudulently induced EPA to continue incineration at the Site, and then submitted to EPA false claims for payment for their remediation work. The United States declined to intervene.

After five years of discovery, the District Court set December 18, 2000 (shortly before the April 2001 trial date), as the deadline for submission of dispositive motions. Respondents filed dispositive motions in advance of that date and, following a December 15, 2000 hearing, the District Court granted Respondents' motions, with one exception. Plaintiff Don Daniel had testified in his deposition that on two specific occasions he had intentionally miscalibrated a monitoring device known as the "PT-125," which measured draft in the kiln for the incinerator. The court determined to

proceed to trial with respect to those two specific dates of alleged tampering.[1]

However, under the rubric of "pattern and practice" evidence, the District Court permitted Petitioners to present evidence at the April 2001 trial relating not just to tampering with the PT-125, but to all of their allegations of wrong-doing at the site. Following the eleven-day trial, the District Court entered judgment for Respondents. Based on detailed findings of fact, Pet. App. 15-33, the District Court found that (i) Respondents had not knowingly submitted a false claim or statement to the Government regarding tampering with the PT-125; (ii) Respondents had not knowingly submitted a false claim or statement to the Government regarding their performance of work at the Vertac Site; and (iii) Petitioners had failed to present any evidence from which knowledge of falsity or intent to submit a false claim may be inferred. Pet. App. 33. The District Court also rejected each and every one of Petitioners' allegations of wrongdoing by Respondents. Pet. App. 15-33.

Petitioners appealed, raising issues concerning the pre-trial motions and limited evidentiary rulings. The District Court's decisions were affirmed by the Eighth Circuit Court of Appeals in all respects. Pet. App. 11.

B. THE EIGHTH CIRCUIT'S DECISION

In affirming the District Court's summary judgment decision dismissing the majority of Petitioners' FCA claims, the Eighth Circuit recognized that for a claim for payment to

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[1] By agreement of the parties, the District Court divided the trial into two phases. In Phase 1, Petitioners had the burden of proving that tampering with the PT-125 occurred on the two dates in question and, if so, whether Respondents had knowledge of the tampering as defined in the FCA. Had Plaintiffs prevailed in Phase 1, the second phase of trial would have involved the issue of whether the tampering events were material.

be false under the statute, the claim must be material in some way to the payment decision. Pet. App. 6-7. The appellate court, however, declined to define the "precise contours of the materiality requirement" because, under any formulation, "[p]laintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision." Pet. App. 7.

The Eighth Circuit also reviewed the trial court's inquiry into EPA's knowledge of the operational difficulties at the site, concluding that Respondents' openness with EPA "negated the required scienter" for liability under the Act. Pet. App. 9. "A contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required by the Act." Pet. App. 8. Finally, the appellate court affirmed the noncontroversial proposition that fraud must be pled with particularity, and affirmed the District Court's dismissal of Petitioners' claims under Fed. R. Civ. P. 9(b). Pet. App. 9-11.

C. PETITIONERS ATTEMPT TO RELITIGATE FACTS BEFORE THIS COURT

Relators rely on certain factual assertions in support of their petition. Based on the evidence, the District Court rejected each one of these claims, and the Court of Appeals affirmed. Though they might disagree with the lower courts' findings, that disagreement does not form the basis for granting certiorari.

First, Petitioners allege that Respondents concealed facts concerning the Site's operation in order to fraudulently induce EPA to award them the incineration contract in 1993, and then continued to hide the problems, including worker safety issues, to fraudulently procure payment under the

contract. Pet. 9-10. The District Court, as affirmed by the Eighth Circuit, found otherwise:

> EPA participated at the Vertac Site from the inception of the cleanup. EPA had a Remedial Project Manager assigned to the site, as well as a team of engineers, a risk assessment specialist and other scientists. During the period of the State's contract, EPA regularly communicated with the State and had access to the documents concerning the State contract and the performance of the incinerator. EPA also reviewed State reports concerning the site and conducted regular discussions with State personnel about various aspects of the operation.

Pet. App. 17.

The District Court further concluded that much of the information concerning occurrences at the Site came from Respondents' detailed reports to the Government:

> Also following June 8, 1993, URS and VSC provided EPA with multiple reports of the site operations, including: daily reports; weekly reports (which included daily reports, shift engineer reports, unusual incident reports, and photographs); monthly reports; special reports authorized by Work Assignment Forms as to individual aspects of the incineration operations; RCRA compliance audit reports; quality assurance reports; payment reports; fee award reports; and air monitoring reports. URS's shift engineers were present on-site 24 hours per day, and their contemporaneous shift reports were included in the reports to EPA.

Pet. App. 17. Petitioners cannot relitigate these findings before this Court.

The petition focuses much attention on air monitoring data from VSC's on-site monitors that Petitioners claim Respondents hid from EPA. Pet. 10. These "facts," too, were rejected by the courts below. The District Court found that there was no contractual duty to disclose VSC's air monitor-

ing data, but that Respondents nonetheless had notified EPA that the elevated dioxin level readings recorded by the site perimeter monitors were caused by operational upsets at the incinerator:

> At the February 1992 meeting convened by EPA to study the cause of elevated dioxin levels at the site, VSC Project Manager, Bob Apa advised EPA, ADPC&E and the independent consultants that VSC believed four of the five elevated dioxin samples being studied by EPA could be correlated to reported kiln puffs or flame-outs occurring on specific dates.
>
> Unlike the URS perimeter air monitors, there was no requirement that VSC report the results of its onsite monitors.

Pet. App. 30.[2] The District Court also found that EPA was well aware of the air emissions data: "Further, even during the time period when the State of Arkansas had lead responsibility for the incineration, EPA used VSC's operations logs and other site reports to understand and interpret the URS perimeter air monitoring data." Pet. App.

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[2] For its own purposes, VSC maintained air monitors proximate to the incinerator. These monitors were not contractually required. Pet. App. 30. The other monitors, located on the perimeter of the site, to track off-site air impacts, never exceeded EPA's applicable limits during the entire duration of incineration.

> As of June 1993, EPA was aware of the VSC on-site monitoring data. On April 21, 1994, William Luthans, Chief of EPA's Arkansas/Louisiana Enforcement Section wrote to the local newspaper explaining the differences between the VSC monitoring data and the EPA ambient air actions levels. Mr. Luthans explained that because the VSC monitors are located adjacent to the incinerator, they cannot be compared to the EPA ambient air monitoring action levels which are levels established to protect the community beyond the fenceline who may be exposed twenty-four hours a day, seven days a week.

Pet. App. 30.

30. And, "[t]he evidence does not show a deliberate effort on the part of VSC to hide its on-site air monitoring data, or other data." Pet. App. 31.

Finally, the courts below rejected Petitioners' claims that if EPA had been aware of the incinerator's problems, the agency would have ceased payment under the contracts:

> During the performance of the Vertac on-site incineration, EPA was aware of the allegations made by plaintiffs in this lawsuit, including those relating to tampering with the computer monitoring equipment. EPA conducted numerous investigations of these allegations. Despite plaintiffs' allegations and its investigations, EPA continued with the contract and continued to make payment under the contract.

Pet. App. 18.

The District Court's and the Eighth Circuit's findings of fact do not accord with Petitioners' version of the facts. That disagreement does not create an issue for review by this Court.

ARGUMENT

The petition does not present an issue for resolution by this Court. The Eighth Circuit's opinion does not conflict with prior decisions of the Court. Notwithstanding Petitioners' claims, none of the issues resolved by the appellate court are the subject of a conflict among the circuits. The District Court, as affirmed by the Court of Appeals, applied settled FCA principles to the facts before it. Petitioners disagree with the result. Disagreement with a court's application of law to the facts, however, is not an appropriate basis for granting certiorari.

I. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND DOES NOT PRESENT AN ISSUE FOR RESOLUTION BY THE COURT.

Petitioners must demonstrate that the Eighth Circuit decided "an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). To do so, Petitioners incorrectly describe the Eighth Circuit's decision as conflicting with two decisions of this Court: *Neder v. United States,* 527 U.S. 1 (1999) and *United States v. Wells,* 519 U.S. 482 (1997). Neither *Neder* nor *Wells* concerned the False Claims Act. Neither case suggested a re-examination of the long-standing and widely-accepted precedent finding materiality to be an element of False Claims Act liability. Instead, in order to discern Congressional intent with respect to the liability elements of specific criminal statutes, *Neder* and *Wells* examined the historical context giving rise to those statutes' passage. By their very nature, therefore, the outcomes of these cases are limited to the statutes they examine, and they are not inconsistent with the principle that materiality is a component of liability under the False Claims Act. Even if their reach were broadened to the False Claims Act, then application of the *Neder* and *Wells* framework demonstrates Congress' intent to retain materiality as an element of the False Claims Act.

A. The Eighth Circuit's Decision Is Not In Conflict With Decisions Of This Court.

The Eighth Circuit begins by explaining that its previous decisions had not explicitly considered the question of whether a materiality element is inherent in the False Claims Act. Pet. App. 6. Instead, its earlier opinions recognized that a showing of materiality was necessary to prevail on a claim under the Act, and centered discussion on the application of the materiality standard to each of the individual cases. Pet. App. 6-7. Accepting the conclusion that materiality is an

implicit part of a claim under the statute, the appellate court concluded below that it need not decide the issue of how to define the parameters of the materiality standard:

> We need not decide the precise contours of the materiality requirement, however, because we hold that the plaintiffs have failed to produce evidence raising a genuine issue of material fact as to whether the allegedly withheld information was even relevant to the EPA's payment decision.

Pet. App. 7.

Petitioners argue that this language somehow creates a conflict with this Court's decisions in *Neder* and *Wells*. Petitioners' argument misreads both cases.

1. Neder *and* Wells *do not conflict with the conclusion that materiality is an element of False Claims Act liability.*

In 1999, this Court unanimously held that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. *Neder,* 527 U.S. at 20-25. To reach that conclusion, the Court employed the framework set forth in *Wells,* 519 U.S. 482. To the extent a statute's language does not expressly enumerate materiality as an element, a court must turn to a "necessary second step:" the context and history of the legislation. *Neder*, 527 U.S. at 21. "It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms.' " *Id.* at 21 (citations omitted).

Neder describes the context of the 1872 passage of the original mail fraud statute as one in which the "common law could not have conceived of 'fraud' without proof of materiality." *Id.* at 22. The Court recognized materiality in the mail fraud statute based on (i) the common law notion

that fraud encompasses materiality and (ii) the absence of an expression of Congressional intent to the contrary. *Id.* at 23.

Wells examines the 1948 passage of 18 U.S.C. § 1014, which criminalized a knowing false statement to a federally insured bank. Congress passed Section 1014 as part of recodification of the criminal code. Congress retained in some sections of the new code an express requirement for materiality, did not change other sections that were silent on the issue, and omitted materiality from passages where it had previously been present. *Wells,* 519 U.S. at 492-93. Viewed against this backdrop, the Court concluded that Congress intended the absence of materiality from Section 1014. *Id.* at 494-95. The issue in *Wells* arose from a far different context than that which existed at the time of the mail fraud statute, and its contemporary, the False Claims Act. The Court's opinion in *Wells,* therefore, does not preclude the Eighth Circuit's decision in *Costner.*

2. *Application of the* Wells *and* Neder *framework to the False Claims Act does not yield the conclusion that materiality is not an element of the Act.*

Application of the framework employed in *Wells* and *Neder* to the False Claims Act yields the conclusion that materiality is properly an element of liability under the statute. Like the mail fraud statute examined in *Neder*, the False Claims Act does not use the word "material." Instead, the four main liability provisions under the Act impose liability on a person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim *for payment or approval*;

> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim *paid or approved by the Government*;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim *allowed or paid*; . . .
>
> (7) knowingly makes, uses or causes to be made or used, a false record or statement to *conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government* . . . .

31 U.S.C. § 3729(a) (emphasis added). The absence of the word material, however, does not end the inquiry. Under *Neder* and *Wells*, the next step is an examination of the context, and then the legislative history of the statute.

Here, the False Claim Act's provisions contemplate a materiality component because they establish a scheme by which liability is only imposed when the misconduct or misstatements bear upon the claimant's entitlement to payment—that is the very purpose of the statute. In other words, a claim for payment cannot be "false" if it would have been paid or approved notwithstanding the alleged misconduct or misstatement. A "false statement" cannot be used to "get" a claim paid or approved by the Government unless it is relevant to the Government's payment decision.

Further, Petitioners concede that "fraud" connotes materiality: "Both [the *Wells* and *Neder*] decisions were very clear in their analyses and holdings to the effect that federal statutes that impose liability for making false statements, as distinguished from making fraudulent statements or engaging in fraudulent conduct, do not contain by implication any materiality requirement." Pet. 19. This admission is fatal to Petitioners. There is absolutely no basis on which to read the statute's language to require materiality for a fraudulent claim, but to dispense with the requirement for a false claim. Thus, the language and structure of the False Claims

Act leads to the conclusion that materiality is an element of liability.

The history and context of the statute's passage and subsequent amendments reinforce the conclusion. Enacted in 1863, the False Claims Act is a contemporary of the mail fraud statute which the Court in *Neder* characterized as coming at a time when "the common law could not have conceived of 'fraud' without proof of materiality." *Neder*, 527 U.S. at 22. The Act was passed in reaction to "[a] series of sensational congressional investigations into the sale of provisions and munitions to the War Department" during the Civil War, which uncovered numerous instances in which the Government had been billed for "[n]onexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Thus, the Act's very purpose was to police false claims of entitlement to public money, and the "false" statement causing the payment of public money—not inconsequential false statements, mistakes, or misstatements. *See United States v. Bornstein,* 423 U.S. 303, 314 (1976), *quoting United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551-52 (1943) ("We think the chief purpose of the [Act's civil penalties] was to provide restitution to the government of money taken from it by fraud . . ."). *See also* S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ("The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.").

The subsequent legislative history confirms the tie between the materiality of the false statement or claim and the entitlement to payment. The 1986 amendments to the False Claims Act codified the "reverse" false claims provision. In adding this provision (31 U.S.C. § 3729(a)(7)), Congress

recognized that the false statement giving rise to liability under the statute must be material, and equated a material representation aimed at avoiding the payment of money to the Government to a false claim to receive payment from the Government:

> Section 1, paragraph (7) of the bill amends section 3729 to provide that an individual who makes a material representation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money.

S. Rep. No. 99-345, at 18, *reprinted in* 1986 U.S.C.C.A.N. at 5283.

Finally, given the number of cases that have recognized materiality to be a component of False Claims Act liability, *see* Section II *infra,* Congress could have amended the statute to disavow the element of materiality. It has not done so, thus evidencing its intent to retain materiality as an element of liability under the statute. *See, e.g., Equal Employment Opportunity Comm'n v. Arabian American Oil Co.,* 499 U.S. 244, 258 (1991) ("Congress, should it wish to do so, may similarly amend Title VII and in so doing will be able to calibrate its provisions in a way we cannot").

B. The Eighth Circuit's Decision Is In Accord With Long-Standing False Claims Act Jurisprudence And Does Not Create New Law.

The Eighth Circuit's decision does not affect False Claims Act jurisprudence. As set forth in Section II below, it is consistent with other Eighth Circuit and appellate precedent finding materiality to be an inherent part of the statute. The Eighth Circuit specifically reserved definition of the materiality standard for another day, finding that regardless of what measure of materiality was applied Petitioners had not raised any facts that could support their case. Pet. App. 7. This conclusion is dependent on the facts in the record in this

case, Pet. App. 7, making it of limited application to other FCA cases.

Because the decision below does not create new law and does not present a conflict with this Court's decisions, the petition for certiorari should be denied.

II. THE EIGHTH CIRCUIT'S DECISION ON MATERIALITY DOES NOT CONFLICT WITH OTHER CIRCUITS.

Petitioners argue that the "courts of appeals are also split and considerably uncertain . . . regarding the existence of . . . any materiality requirement." Pet. 27. Petitioners, however, fail to identify the requisite disagreement among appellate courts. The decision at issue followed Eighth Circuit precedent when it held that "the [False Claims] Act provides recovery from one 'who makes a *material* misrepresentation to avoid paying some obligation owed to the government.' " Pet. App. 6, *quoting United States v. Q Int'l Courier, Inc.*, 131 F.3d 770, 772 (8th Cir. 1997) (emphasis added); *see also Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 563 (8th Cir. 1997). The Eighth Circuit holding is also consistent with the law in other circuits. Each circuit that has decided this issue has agreed that materiality is an essential element under the civil False Claims Act. Thus, there is no split in the Circuits for this Court to resolve.

In their attempt to manufacture a circuit split, Petitioners misconstrue the Fifth Circuit's holding in *United States v. Southland Management Corporation,* 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds,* 326 F.3d 669 (5th Cir. 2003) (en banc) and the Third Circuit's holding in *United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402 (3d Cir. 1999). Contrary to Petitioners' argument, Pet. 15, those two cases do not create a circuit split, nor do they support Petitioners' assertion that recent

Supreme Court decisions "likely preclude" the FCA's materiality requirement.

A. There Is No Conflict In The Circuits.

The appellate courts addressing the issue have held that materiality is an indispensable element of a civil False Claims Act case. Most circuit courts—including the First, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits and the Court of Federal Claims—have either explicitly or implicitly required materiality. *See, e.g., United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (holding that false statement that was not material did not give rise to FCA liability); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785, 788 (4th Cir. 1999) (FCA liability subject to requirement that the false statement or claim be material); *United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1459 (4th Cir. 1997) ("we now make explicit that the current civil False Claims Act imposes a materiality requirement"); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) ("the FCA interdicts material misrepresentations made to qualify for government privileges or services" (internal quotation and citation omitted)); *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-33 (7th Cir. 1999) (dismissing FCA claim because plaintiff did not show false statement "was material to the United States' buying decision"); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999) (agreeing with Fourth Circuit's FCA materiality requirement and dismissing FCA suit because alleged misrepresentations were found to be immaterial to government funding); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996) (finding that false compliance certifications create FCA liability only when certification is a prerequisite to a government benefit); *United States ex rel. Butler v. Hughes Helicopter & McDonnell Douglas*, CV 89-760, 1993 WL

841192, at *15 & n.5 (C.D. Cal. Aug. 25, 1993) (Ninth Circuit has implied that false statements must be material under the FCA) (unpublished decision), *aff'd*, 71 F.3d 321 (9th Cir. 1995); *Tyger Construction Co. v. United States,* 28 Fed. Cl. 35, 55 (Fed. Cl. 1993) ("the FCA covers only those false statements that are material").[3]

Further, since the Supreme Court's 1997 decision in *Wells*, many courts have determined that materiality is an element of a FCA violation. The case law cited above includes multiple district court and appellate court decisions that have reaffirmed that materiality is an essential element of the False Claims Act since *Wells* was decided in 1997. Thus, Petitioners' criticism of the long standing precedent in the circuits is unpersuasive.[4]

B. *Southland* And *Cantekin* Do Not Create A "Split" In The Circuits.

Petitioners cite two cases—*United States v. Southland Management Corporation,* 288 F.3d 665 (5th Cir. 2002), *vacated and decided on other grounds,* 326 F.3d 669 (5th Cir.

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[3] Although the Courts of Appeals for the Third and Eleventh Circuits have not had the opportunity to reach the issue, at least one district court within each of those circuits has affirmed the materiality requirement. *See, e.g., United States v. Klein*, 230 F. Supp. 426, 432 (W.D. Pa. 1964) ("[f]raud implies a misrepresentation of a material fact"), *aff'd*, 356 F.2d 983 (3d Cir. 1966); *United States v. Hill,* 676 F. Supp. 1158, 1176 n.25 (N.D. Fla. 1987) (government must show that "but for" the false statement it would not have issued guaranteed loan application).

[4] Respondents have identified a single district court decision holding that materiality is not required under the civil FCA. Pet. 16, *citing United States ex rel. Roby v. Boeing Co.,* 184 F.R.D. 107, 112 (S.D. Ohio 1998) (holding without explanation that under *Wells* materiality was not required for the FCA). However, *Roby* has since been explicitly rejected by at least two other courts. *See United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 622, 623-30 (S.D. Tex. 2001); *United States v. Southland Mgmt. Corp.*, 95 F. Supp. 2d 629, 636-37 (S.D. Miss. 2000).

2003) (en banc) and *United States ex rel. Cantekin v. University of Pittsburgh,* 192 F.3d 402 (3d Cir. 1999)—as evidence that there is a "split in the courts of appeals." Pet. 24. Petitioners' reliance on these cases is misguided for two reasons. First, neither case actually held that materiality was not an element. In fact, both cases declined to rule on whether materiality is an element of the FCA because materiality was not at issue in the case. Second, the language cited by Petitioners is not authoritative—one decision was vacated, *Southland,* 326 F.3d 669 (en banc), and the other decision discussed the issue of materiality in dicta, *Cantekin*, 192 F.3d at 415-16. These cases simply do not offer this Court a "compelling reason" for granting certiorari.

Petitioners misconstrue the language and holding in the Fifth Circuit's 2002 decision in *Southland* ("*Southland I*"). The Fifth Circuit's 2002 opinion acknowledges that "many courts, including this court, have found that there is a fourth, 'materiality' element required to maintain a cause of action under the [False Claims] Act." *Southland I,* 288 F.3d at 675, 676 ("this court has indicated that the Act contains a materiality element"). The court noted that it did not reach the question of whether materiality was an element of the FCA and stated that the Fifth Circuit may in the future take the opportunity to assess whether the Supreme Court's decisions in *Wells* and *Neder* "*might* undermine our precedents interpreting the civil FCA to contain an implicit materiality requirement." *Id.* at 701, n.15 (emphasis added). Despite this footnote, the Fifth Circuit upheld the district court's decision that the civil False Claims Act contains a materiality requirement, noting that "not all statutory, regulatory, or contractual violations necessarily give rise to liability under the FCA." *Id.* at 680.

More important, the panel's 2002 decision was *vacated* by an order for rehearing en banc and was affirmed on other grounds in a 2003 en banc decision, *United States v.*

Southland Management Corp., 326 F.3d 669 (5th Cir. 2003) ("*Southland II*"). The Fifth Circuit 2003 en banc majority decision does not reach the issue of materiality. *See Southland II*, 326 F.3d at 671, 675, 677 (ruling that the defendants were entitled to the housing assistance payments they sought from the government; therefore their claims were not false as a matter of law).[5] Petitioners' desperate attempt to create an issue worthy of this Court's review by relying on a footnote in a vacated opinion must fail.[6] *Southland II*, therefore, does not create a split in the circuits.

Petitioners also make much ado over what they concede is dicta in the Third Circuit's opinion in *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402 (3d Cir. 1999). Pet. 17. In *Cantekin*, the Third Circuit considered whether the 1986 amendments to the FCA should be applied retroactively to various grant applications that the defendant researcher submitted to the National Institute of Health. *Cantekin*, 192 F.3d at 404. In considering whether a claim submitted after October 1986 was false, the Third Circuit acknowledged that existing case law required materiality: "[c]ourts have held that claims under the False Claims Act are subject to a judicially-imposed materiality requirement." *Id.* at 415. The Court states, in *dicta*, that "*perhaps* [the Supreme Court's decision in] *Neder argues against* a materiality requirement." *Id.* (emphasis added). However, the Third Circuit stated it "need not decide whether there is a materiality requirement under the False Claims Act, because even if

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[5] The concurring opinion in *Southland II* affirmed the role of materiality in the FCA, and noted that the Government had conceded the issue. *Southland II*, 326 F.3d at 679 (Jones, J., concurring).

[6] Opinions that are vacated "are officially gone. They have no legal effect whatever. They are void. None of the statements made in . . . them has any remaining force and cannot be considered to express the view of this Court." *United States v. Sigma Int'l Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002).

there is, we think it is clear that Bluestone's failure to disclose his industry funding would readily qualify as material." *Id.* Such dictum has "no binding or precedential impact" and is inadequate to grant certiorari on this question. *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995); *Richardson v. Ramirez*, 418 U.S. 24, 83 n.27 (1974).

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OVER WHETHER GOVERNMENT KNOWLEDGE MAY SERVE AS A DEFENSE TO INTENT IN A FALSE CLAIMS ACT CASE.

Apparently recognizing that the decision below provides a second, independent ground to affirm the trial court, Petitioners argue that this Court should grant certiorari to review the FCA's scienter requirement. Petitioners maintain that "the courts of appeals are split on the relevance of government knowledge as a defense, particularly in light of the 1986 amendments to the [False Claims] Act which explicitly removed the government knowledge defense." Pet. 23. Petitioners therefore seek review in this Court as to whether the Eighth Circuit "applied an incorrect legal standard" when it decided that Respondents' disclosure "negated . . . the required intent or scienter" necessary to support a claim under the False Claims Act. Pet. i; *see also* Pet. App. 8-9.

The truth, however, is that, once again, there is no conflict for this Court to resolve. Those circuit courts that have considered whether the government's knowledge of a contractor's actions may serve as a defense to a False Claims Act case agree with two basic propositions. First, the 1986 amendments to the False Claims Act merely eliminated government knowledge as an *automatic bar* to an action; they did not abolish the government knowledge defense. Second, courts agree that the government's knowledge of the facts

underlying a claim is relevant to and can negate a contractor's intent to present a false claim. Accordingly, the uniform practice among these courts is to evaluate the effect of government knowledge on a case-by-case basis. The Eighth Circuit acted in harmony with these decisions when it held that Petitioners could not establish the necessary intent to sustain their claims.

A. The 1986 Amendments To The False Claims Act Did Not Abolish The Government Knowledge Defense.

Before the 1986 amendments to the False Claims Act, government knowledge of a contractor's actions was an absolute bar to a *qui tam* action:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1982). The 1986 amendments to the False Claims Act eliminated this language, and replaced it with language outlining the procedure under which the government must decide to assume an action, or leave it for a private *qui tam* relator. *See* 31 U.S.C. § 3730(b)(4) (1986).

Courts recognize, however, that the 1986 amendments did not eliminate the government knowledge defense in all cases. The Ninth Circuit observed: "[t]he 1986 amendments eliminated this language, however, *leaving open* what would be the effect of government knowledge of the facts underlying a suit." *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 326 (9th Cir. 1995) (emphasis added). The Tenth Circuit likewise agrees that while the government knowledge defense is "no longer an automatic defense to an FCA . . . there may still be occasions when the government's knowledge of or cooperation with a contrac-

tor's actions is so extensive that the contractor could not as a matter of law possess the requisite state of mind to be liable under the FCA." *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 534 (10th Cir. 2000). In addition, the fact that courts continue to recognize and apply government knowledge as a defense to intent, *see* Section III.B *infra*, demonstrates that there is a consensus that the defense remains intact. On the other hand, Respondents are aware of no case in which a court has held that the 1986 amendments to the False Claims Act eliminated the government knowledge defense entirely.

B. The Circuit Courts Uniformly Recognize That Government Knowledge May Serve As A Defense To Intent In A False Claims Act Case.

Despite Petitioners' claim, courts are not confused as to the relevance of government knowledge as a defense to intent in a False Claims Act case. Instead, the circuit courts uniformly hold that government knowledge is both relevant to the question of intent and can "negate" intent if the government's knowledge is sufficiently great to preclude the possibility of the contractor making false statements. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003) (joining four circuit courts in holding that "the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation"); *Shaw*, 213 F.3d at 534 (after reviewing case law, court "assum[es] some level of government knowledge would negate the intent requirement under the FCA"); *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 (7th Cir. 1999) (in case where government knows and approves particulars of a claim before claim for payment is presented, "the government's knowledge effectively negates the fraud or falsity required by the FCA"); *Butler*, 71 F.3d at 327-29 (holding that cooperation and sharing of information between

contractor and Army negated intent required under False Claims Act); *United States ex rel. Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir.) ("the fact that a contractor has fully disclosed all information to the government may show that the contractor has not 'knowingly' submitted a false claim"), *cert. denied*, 508 U.S. 973 (1993); *see also Southland Mgmt. Corp.*, 326 F.3d at 681-84 (en banc) (concurring opinion) (concluding that result in defendants' favor was correct because government knew project's essential condition, and therefore defendants did not "knowingly" present false claim).

There is no conflict presented for this Court's resolution because these holdings are uniform. The Eighth Circuit's decision in this case joins that uniformity by relying on these same authorities in affirming the trial court's decision that "the defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues." Pet. App. 9.

Moreover, the primary case relied on by Petitioners as evidence of a "split" among the circuit courts, *see* Pet. 23, is *in accord* with the cases cited above. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), states that "knowledge possessed by officials of the United States . . . may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth." *Id.* at 1421. The Ninth Circuit later recognized that "*Hagood* left open the possibility that . . . the extent and nature of government knowledge may show that the defendant did not 'knowingly' submit a false claim and so did not have the intent required by the post-1986 FCA." *Butler*, 71 F.3d at 327. That is precisely what the Eighth Circuit decided when it agreed that "if the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have

knowingly presented a fraudulent or false claim." Pet. App. 8, *quoting Becker*, 305 F.3d at 289. Therefore, the very authority cited by Petitioners as a basis for a conflict among the circuit courts supports the uniform approach taken by numerous circuit courts, including the Eighth Circuit in this case. Given this agreement on the legal significance of government knowledge to the question of intent, there simply is no reason to grant certiorari on this question.

C. The Eighth Circuit's Decision Is Consistent With All The Other Circuit Courts That Also Address the Government Knowledge Defense As A Factual Inquiry Into The Information Provided To The Government.

The agreement shared among these courts with respect to the effect of government knowledge on intent is not limited to legal principle. Rather, courts agree that the question is largely one of fact, and therefore is to be treated on a case by case basis. *See Butler*, 71 F.3d at 326 (recognizing that after the 1986 amendments to the FCA, "courts have had to decide case by case whether a FCA claim based on information in the government's possession can succeed"). Accordingly, like the courts below, these courts have engaged in detailed scrutiny of the underlying factual records in order to conclude the level of cooperation between the government and the defendant contractor, and the amount of information provided to the government, was so extensive as to negate the possibility that the contractor could lie to the government. *See Southland Mgmt. Corp.*, 326 F.3d at 683-84 (concurring opinion) (concluding that contractor did not knowingly submit false claims because evidence showed it was in constant contact with government regarding repairs that needed to be made to public housing facilities); *Durcholz*, 189 F.3d 544-45 (holding that contractor did not knowingly submit false claims where evidence showed that contractor was following government's explicit directions regarding

manner in which claims were to be presented); *Butler*, 71 F.3d at 327-28 (holding that defendant could not have knowingly submitted false claims where evidence showed that tests at issue in complaint were the subject of discussion between defendant and Army, and that Army knew of and approved testing method actually used); *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992) (holding that defendant did not act with requisite intent because evidence showed that government had extensive knowledge of all engineering deficiencies identified by *qui tam* relator, and defendant had ongoing dialogue with government about problems); *cf. Shaw*, 213 F.3d at 534 (concluding that government knowledge defense was not established because evidence showed that (i) relator, not defendant, told the government about certain failures, and (ii) defendant was not forthcoming and repeatedly evaded government questioning).

Again, there is no conflict to resolve because the Eighth Circuit proceeded in the same manner in this case. It first recognized the legal principal that "[a] contractor that is open with the government regarding problems and limitations and engages in a cooperative effort with the government to find a solution lacks the intent required under the [False Claims] Act." Pet. App. 8, *citing Butler*, 71 F.3d at 327, and *Wang*, 975 F.2d at 1421. The court then went on to closely examine the record, from which it determined that (i) air monitoring data was available to EPA, (ii) EPA knew of ongoing problems with kiln puffs and kiln leaks "from the beginning," (iii) EPA was aware that rod ports on the incinerator were occasionally opened for maintenance, and that no evidence existed showing that they were opened for an improper purpose, and (iv) defendants openly discussed problems leading to certain OSHA violations. Pet. App. 8-9. Based on its close review of the record, the Eighth Circuit concluded that "[a]lthough the record indicates that the defendants' performance under the contract was not perfect, *the extent of*

the government's knowledge through its on-site personnel and other sources shows that, as in Durcholz, the 'government knew what it wanted, and it got what it paid for.'" Pet. App. 9, *quoting Durcholz*, 198 F.3d at 545 (emphasis added). For these reasons, the Eighth Circuit affirmed the district court's "finding that the defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues." Pet. App. 9. The Eighth Circuit's analysis is in complete harmony with the legal principles and procedures adopted by the other circuit courts that have considered and applied the government knowledge defense to the question of intent. Given the Eighth Circuit's uniform approach to this issue, there is no conflict over which this Court should grant certiorari.

II. THE EIGHTH CIRCUIT'S DECISION ON RULE 9(B) DOES NOT CREATE AN ISSUE WORTHY OF REVIEW BY THIS COURT.

There can be no dispute that Rule 9(b) of the Federal Rules of Civil Procedure is applicable to FCA litigation, and is applicable to *qui tam* relaters. Petitioners nonetheless urge review because in their view the Eighth Circuit imposed a particularity requirement at odds with the Fourth Circuit's opinion in *Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776 (4th Cir. 1999). Pet. 26. In *Harrison*, the Fourth Circuit stated that the court must be "satisfied (1) that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial and (2) that plaintiff has substantial pre-discovery evidence of those facts." *Harrison*, 176 F.3d at 784. The Fourth Circuit actually dismissed Counts 4, 7 and 8 of the Complaint in *Harrison* because the Plaintiff failed adequately to plead the underlying fraud. *Id.* at 789.

Thus, contrary to Petitioners' argument, the Fourth and Eighth Circuits are in agreement that specificity as to the underlying fraudulent conduct is required when that information is necessary to prepare a defense. The remaining Courts of Appeal that have addressed this issue also are in agreement. *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001) (complaint that alleged fraud due to tampering with tests was insufficient because Plaintiffs failed to specify the types of tests implicated, the identity of the employees who performed the tests, and the dates, times and places where the tests were conducted); *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 552 (D.C. Cir. 2002) (detailed description of the specific falsehoods that are the basis of the claim are required); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995) (specific statements or conduct giving rise to the fraud claim are required); *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, No. 02-40285, 2003 WL 21467963, at *8 (5th Cir. June 26, 2003) (circumstances constituting fraud or mistake required); *Bly-Magee v. California,* 236 F.3d 1014, 1019 (9th Cir. 2001) (notice of the particular misconduct which is alleged is required); *United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002) (making clear that Rule 9(b) does apply to actions under the False Claims Act).

Notwithstanding the consistent authority to the contrary, Petitioners urge review by this Court because they believe that the District Court and the Eighth Circuit improperly required them to specify the details of the underlying fraudulent conduct. Significantly, the courts below imposed the particularity requirement not on the admittedly inadequate allegations in the complaint, but rather on the disclosures in discovery. The trial court required disclosure of the particular details of the claim after five years of litigation and only four months prior to trial. The Eighth Circuit explained the

rationale for its requirement: "[w]ithout information as to who tampered with the monitors and how and when the tampering occurred, the defendants would be largely unable to respond with contemporaneous witnesses and documents and expert witnesses to testify as to whether the monitoring data is consistent with the tampering of the sort alleged to have occurred." Pet. App. 11. This is textbook law.

As to the underlying fraudulent conduct that Petitioners subsequently identified in discovery (*i.e.*, the two dates of alleged tampering that were disclosed and litigated), the District Court found that "Daniel's different versions of the tampering were contradicted by all of the other witnesses and by the contemporaneous site records and historian data" and the District Court "had no hesitancy in completely discrediting [Daniel's] testimony." Pet. App. 13. Such a specific finding by the trial court does not provide a basis for a petition for certiorari.

CONCLUSION

For the reasons set forth above, Respondents respectfully request the Court to deny the petition for certiorari.

Respectfully submitted,

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